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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 364

KEIFER AND KEIFER, A CO-PARTNERSHIP, COMPOSED OF J. WARREN KEIFER, JR., AND OSWIN KEIFER, PETITIONER,

vs.

RECONSTRUCTION FINANCE CORPORATION AND REGIONAL AGRICULTURAL CREDIT CORPORATION OF SIOUX CITY, IOWA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 20, 1938.

CERTIORARI GRANTED OCTOBER 24, 1938.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEBRASKA, OMAHA DIVISION

Law. No. 3627

KEIFER AND KEIFER, a Co-partnership Composed of J. Warren Keifer, Jr., and Oswin Keifer, Plaintiff,

vs.

RECONSTRUCTION FINANCE CORPORATION, a Corporation, and Regional Agricultural Credit Corporation of Sioux City, Iowa, a Corporation, Defendants

PETITION—Filed December 14, 1936

Plaintiff for causes of action alleges:

First Cause of Action

(1) That defendant Regional Agricultural Credit Corporation of Sioux City, Iowa, a corporation, hereinafter for the sake of brevity referred to as Regional, is a corporation created under an act of Congress authorizing the Reconstruction Finance Corporation to create a Regional Corporation in any Federal Land Bank District; that pursuant thereto the Reconstruction Finance Corporation, a corporation, issued a charter to the defendant Regional Agricultural Credit Corporation on September 10, 1932, a copy of which is attached hereto, marked Exhibit A and by this [fol. 2] reference made a part hereof; that the defendant Regional maintains a branch office in Nebraska located in Omaha, Douglas County, Nebraska.

(2) That the Reconstruction Finance Corporation is a corporation authorized and created by an act of Congress and was by said act specifically authorized to sue and be sued; that the Reconstruction Finance Corporation, hereinafter referred to as the R. F. C. for the sake of brevity, subscribed and paid for all of the capital stock of the defendant Regional; that by the act of Congress providing for the creation of the defendant Regional by the R. F. C., the

R. F. C. was authorized and directed to supervise and pay all expenses incurred in connection with the operation of the said Regional Agricultural Credit Corporation; that by virtue of said provision the defendant R. F. C. created, financed, owned and supervised the defendant Regional at the time of the acts and omissions herein complained of and that said acts and omissions of the defendant Regional were the acts and omissions of the defendant R. F. C.; that defendant R. F. C. maintains a branch office in Nebraska located in Omaha, Douglas County, Nebraska.

(3) That the causes of action herein set forth arise under the laws of the United States.

(4) That plaintiff on or about the 21st day of October, 1934, delivered to the defendant Regional 388 head of cattle, consisting of 197 cows, 5 bulls and 186 calves; that the defendants orally agreed with plaintiff to winter said livestock in a careful and efficient manner, provide the livestock with good grassland, plenty of feed of all kinds and water, and to have them taken care of by experienced and capable livestock men, and defendants agreed to return to plaintiff all of said livestock in the spring of the year in as good condition as when turned over to defendants; that defendants agreed to feed and care for said cattle in a competent manner during the winter of 1934-35.

(5) That thereafter and after the aforementioned cattle were placed in the hands of defendant Regional, defendant Regional by false and fraudulent representations and by coercion, hereinafter set forth, and by taking advantage of plaintiff's necessities, fraudulently induced plaintiff to enter into a pretended contract by the terms of which plaintiff purported to waive damages caused by defendants; that such a waiver of damages is unconscionable, unlawful and unenforcible because of the unreasonableness of the terms thereof, and because said pretended waiver was obtained [fol. 3] by fraud and coercion as follows, to-wit; that defendant Regional represented that said new written contract was not materially different from the oral contract under which plaintiff had previously given possession of said livestock to defendant Regional, represented that if plaintiff would sign said new contract, defendant Regional would winter the cattle with plenty of feed, upon good hay land, with experienced and capable men and in the spring

the livestock would be in better, or as good, condition as when possession was turned over to defendant Regional; that by turning said cattle hereinbefore described over to the defendant Regional, plaintiff would be able to avoid loss of any of his livestock; that defendants at the time said promises were made had no intention to keep or perform said promises; that plaintiff's partners are unskilled in the use of technical terms and were unaware of the pretended waiver contained in said unconscionable agreement or the meaning thereof; that the aforesaid oral representations were relied upon by plaintiff in signing said purported contract; that said representations were relied upon by plaintiff in executing the contract presented by the Regional; that said representations, and each of the same, were false and untrue and that said purported waiver is of no force and effect; that defendant Regional further threatened that the cattle owned by plaintiff, subject to a mortgage to defendant Regional, would be sold immediately; that said purported waiver is of no force and effect because of said fraudulent and unlawful acts of defendants.

(6) That defendant Regional having obtained possession of said livestock was negligent in that:

(a) It knowingly employed inefficient help on, and unskilled management of, the ranch near Whitman, Nebraska, upon which said cattle were placed by the Regional for wintering.

(b) It failed to provide feed for said cattle for a long period of time; placed the cattle upon pasture which had been grazed bare.

(c) Drove the cattle into Whitman in long, unreasonable drives, at a fast pace; kept the cattle at night where no feed or water was available during said drives.

(d) Fed the cattle a cotton-seed compound, known as cake, in such a manner that the larger and stronger of the cattle ate too much, became foundered, ill and weakened and said feed being inaccessible to the small and weaker, a great number of the cattle obtained none and became weak from hunger and died or were permanently injured.

[fol. 4] (e) Sold hay which was available for feed and which was represented to plaintiff would be fed said cattle,

later ran short of hay and al-owed the cattle to go without hay or feed and to become weakened and underfed.

(f) Gave no care to cattle becoming sick, or heavy with calf, allowing many to die and gave no care to calves dropped causing the loss of the calves.

(g) Gave no care to the cattle during a long rain and snowstorm, but allowed the cattle to drift and become lost, wander into the open and suffer [great] from said storm, whereby many of said cattle perished.

(h) Sold a portion of plaintiff's cattle at a public sale almost immediately after the heavy storm hereinbefore mentioned at a time when the cattle were in bad condition for sale and at a time and place where the market was not likely to be, and was not, profitable to plaintiff.

(i) Failed to protect said cattle from theft and straying.

(7) That after the delivery of said 388 head of cattle to the defendants and their arrival at Whitman, Nebraska, the defendants further offered to fatten the 186 calves in defendants' possession during the winter months; that defendants agreed for a charge of not more than $7.00 per head to ship, feed, care for, maintain and so handle such calves that the calves would gain 200 pounds or more per head by late spring of 1935; that said plaintiff accepted the offer of the defendants and allowed the defendants to move the calves under the above contract.

That the defendants shipped said calves to Melbeta, Nebraska, and that the defendants thereafter negligently failed to care for and maintain said calves but allowed the same to become greatly damaged by the following negligent acts, to-wit:

(a) Defendants placed said calves and the calves of others in a small feed lot; that the calves were crowded and no space for free movement of the calves was available.

(b) That said calves were not fed regularly or properly.

(c) That said calves were not watered regularly or properly.

(d) That the feed lot was not kept clean, in that manure was allowed to accumulate to a depth of several feet.

(e) That defendants knowingly employed incompetent, inexperienced and inefficient help to care for said calves.

[fol. 5] (f) That no care was given said calves during inclement weather; that no sufficient shelter was provided; that the water supply available, if any, was allowed to become inaccessible through freezing.

(8) That as a result of the negligent acts of defendants hereinbefore alleged, or one or more of them, plaintiff has suffered the following items of damage to livestock placed in defendants' care, to-wit:

(a) The death of 36 cows of a reasonable value of $56.00 each or a total of $2016.00.

(b) The loss through straying, theft, wrongful sale, or death of 12 cows of a reasonable value of $56.00, each, or a total of $672.00.

(c) The loss of the calf crop, which the 197 head of cows turned over to the defendants would have had and which could have been returned to plaintiff above the 29 dropped by said cows and returned except for defendants' negligent acts aforesaid, a total of 157 calves of a value of $25.00 each or a total of $3925.00.

(d) Each cow returned to plaintiff by defendants was of $30.00 less value than these same cattle when delivered to defendants, with a total loss to plaintiff upon the 148 cows returned of $4440.00. Each bull returned to plaintiff by defendants was of $50.00 less value than these same bulls when delivered to defendants, with a total loss to plaintiff upon the 5 bulls returned of $250.00.

(e) The loss of the 1936 calf crop from the fact that 148 cows returned were in such poor condition that they would not breed, to plaintiff's damage in the sum of $3000.00.

(f) The death of 8 calves of a reasonable value of $50.00 per head caused by the negligence of defendants hereinbefore alleged, or a damage to plaintiff by defendants of $400.00.

(g) The wrongful and unauthorized sale of 128 head of plaintiff's calves at a time when through the negligent acts of defendants hereinbefore alleged, the calves were in poor condition and should not have been offered for sale; that de-

fendants, knowing these facts, nevertheless, wrongfully and negligently, sold said 128 head to plaintiff's loss in the sum of $32.00 per head, or a damage to plaintiff by defendants' negligence in the sum of $4096.00.

(h) The lean, weakened and unhealthful condition of the 50 head of calves returned to plaintiff, which condition [fol. 6] caused to plaintiff a loss of $15.00 per head, or a damage to plaintiff by defendants' negligence in the sum of $750.00.

That plaintiff has thereby been damaged in the total sum of $19,549.00.

Second Cause of Action

(1) Plaintiff makes a part hereof as though set forth herein in full paragraphs 1, 2, 3, 5 and 6 of the first cause of action herein, making the same applicable to Albert Berzina as plaintiff's assignor.

(2) Alleges that Albert Berzina on May 22, 1936 transferred and assigned to the plaintiff herein his claim and cause of action against defendants as set forth in this cause of action for the purpose of collection; that attached hereto and marked Exhibit B is a copy of said assignment and, except for the date, signature and witness, all of said assignments are identical in form; that said assignment is now in the possession of this plaintiff.

(3) That on or about the 7th day of November, 1934, Albert Berzina placed in the hands of the defendant Regional 108 head of Hereford cattle; that because of various head being withdrawn during the winter season and because of the escape of part of the cattle under the control of the defendants to Albert Berzina's premises, Albert Berzina and defendants mutually agreed to fix the number of cattle defendants wintered for said Berzina at 70 head, and that charges for wintering would be made on the basis of 70 head of cattle; that the defendants agreed with plaintiff to winter said 108 head of livestock in a careful and efficient manner, provide the livestock with water, good grassland, plenty of feed of all kinds and to have them taken care of by experienced and capable livestock men and defendants agreed to return to plaintiff all of said livestock in the spring of the year; that defendants agreed to feed and care

for said cattle in a competent manner during the winter of 1934-1935.

(4) That as a result of the grossly and wilfully negligent acts of defendants hereinbefore alleged, Albert Berzina and plaintiff, as trustee, have suffered the following items of damage to livestock placed in defendants' care, to-wit:

(a) The loss through straying, theft or death of 21 cows of a reasonable value of $56.00 or a total of $1176.00.

(b) The loss of the calf crop, which the 108 head of cattle turned over to defendants would have had except for de- [fol. 7] fendants' negligent acts aforesaid, a total of 100 calves of a value of $25.00 each, or a total of $2500.00.

(c) Each cow returned to Albert Berzina by defendants was of $25.00 less value than these same cattle when delivered to defendants, with a total loss to Albert Berzina and plaintiff as assignee from the eighty-seven cows returned of $2175.00.

That Albert Berzina and plaintiff as assignee, have thereby been damaged in the total sum of $5851.00.

Third Cause of Action

(1) Plaintiff makes a part hereof as though set forth herein in full paragraphs 1, 2, 3, 5 and 6 of the first cause of action herein, making the same applicable to John R. Jochem as plaintiff's assignor.

(2) Alleges that John R. Jochem on May 23, 1936 transferred and assigned to the plaintiff herein his claim and cause of action against defendants as set forth in this cause of action for the purpose of collection; that attached hereto and marked Exhibit B is a copy of said assignment and, except for the date, signature and witness, all of said assignments are identical in form; that said assignment is now in the possession of this plaintiff.

(3) That John R. Jochem on or about the 3rd day of November, 1934 placed in the hands of the defendant Regional 158 head of cattle as follows: 125 Hereford cows and 33 Hereford branded calves; that the defendants agreed with plaintiff to winter said livestock in a careful and efficient manner, provide the livestock with water, good grassland, plenty of feed of all kinds and to have them

taken care of by experienced and capable livestock men and defendants agreed to return to John R. Jochem all of said livestock in the spring of the year in as good condition as when turned over to defendants, reasonable loss excepted; that defendants agreed to feed and care for said cattle in a competent manner during the winter of 1934-35.

(4) That as a result of the grossly and wilfully negligent acts of defendants hereinbefore alleged, John R. Jochem and the plaintiff, by assignment have suffered the following items of damage to livestock placed in defendants' care, to-wit:

(a) Death of twelve cows of a reasonable value of $56.00 each or a loss of $672.00.

(b) The loss through straying, theft or death of eleven cows of a reasonable value of $56.00, or a loss of $616.00.

[fol. 8] (c) The loss through straying, theft or death of eight branded calves of a reasonable value of $25.00 or a loss of $200.00.

(d) The loss of the calf crop, which the 124 head of cattle turned over to the defendants would have had except for defendants' negligent acts aforesaid, a total of 72 calves of a value of $30.00 each, or a total of $2160.00.

(e) Each cow and calf returned to John R. Jochem by defendants was of $25.00 less value than these same cattle were when delivered to defendants with a total loss to plaintiff upon the 124 cows and calves returned of $3100.00.

That John R. Jochem and [plea-ntiff], as assignee, were thereby damaged in the total sum of $6748.00.

Fourth Cause of Action

(1) Plaintiff makes a part hereof as though set forth herein in full paragraphs 1, 2, 3, 5 and 6 of the first cause of action herein, making the same applicable to Gustav Jochem as plaintiff's assignor.

(2) Alleges that Gustav Jochem on May 20, 1936 transferred and assigned to the plaintiff herein his claim and cause of action against defendants as set forth in this cause of action for the purpose of collection; that attached hereto and marked Exhibit B is a copy of said assignment and,

except for the date, signature and witness, all of said assignments are identical in form; that said assignment is now in the possession of this plaintiff.

(3) That on or about the 25th day of October, 1934, Gustav Jochem placed in the hands of the defendant Regional 78 head of cattle; that the defendants agreed with plaintiff to winter said livestock in a careful and efficient manner, provide the livestock with water, good grassland, plenty of feed of all kinds and to have them taken care of by experienced and capable livestock men and defendants agreed to return to Gustav Jochem all of said livestock in the spring of the year in as good condition as when turned over to defendants, reasonable loss excepted; that defendants agreed to feed and care for said cattle in a competent manner during the winter of 1934-1935.

(4) That as a result of the grossly and wilfully negligent acts of defendants hereinbefore alleged, plaintiff has suffered the following items of damage to livestock placed in defendants' care, to-wit:

(a) The death of 18 cows of a reasonable value of $56.00 each, or a total of $1008.00.

[fol. 9] (b) The loss through straying, theft or death, of ten cows of a reasonable value of $56.00, or a total of $560.00.

(c) The loss of the calf crop, which the 75 head of cattle turned over to defendants would have had except for defendants' negligent acts aforesaid, a total of 75 calves of the value of $25.00 each, or a total of $1875.00.

(d) Each cow returned to plaintiff by defendants was of $25.00 less value than these same cattle when delivered to defendants, with a total loss to plaintiff upon the 45 cows returned of $1125.00.

That Gustav Jochem and plaintiff, as assignee, have thereby been damaged in the total sum of $4568.00.

Fifth Cause of Action

(1) Plaintiff makes a part hereof as though set forth herein in full paragraphs 1, 2, and 3 of the first cause of action herein, making the same applicable to Charles J. Mach as plaintiff's assignor.

(2) That defendants offered to Charles J. Mach to fatten 193 head of his calves during the winter months; that defendants agreed for a charge of not more than $7.00 per head to ship, feed, care for, maintain and so handle such calves that the calves would gain 200 pounds or more per head by late spring of 1935; that said Charles J. Mach accepted the offer of the defendants and allowed the defendants to move the calves under the above contract.

That the defendants shipped said calves to Melbeta, Nebraska, and that the defendants thereafter negligently failed to care for and maintain said calves but allowed the same to become greatly damaged by the following negligent acts, to-wit:

(a) Defendants placed said calves and the calves of others in a small feed lot; that the calves were crowded and no space for free movement of the calves was available.

(b) That said calves were not fed regularly or properly.

(c) That said calves were not watered regularly or properly.

(d) That the feed lot was not kept clean, in that manure was allowed to accumulate to a depth of several feet.

[fol. 10] (e) That defendants knowingly employed incompetent, inexperienced and inefficient help to care for said calves.

(f) That no care was given said calves during inclement weather; that no sufficient shelter was provided; that the water supply available, if any, was allowed to become inaccessible through freezing.

(3) Alleges that Charles J. Mach on the 3rd day of December, 1936 transferred and assigned to the plaintiff herein his claim and cause of action against defendants as set forth in this cause of action for the purpose of collection; that attached hereto and marked Exhibit B is a copy of said assignment and, except for the date, signature and witness, all of said assignments are identical in form; that said assignment is now in the possession of this plaintiff.

4. That as a result of the grossly and wilfully negligent acts of defendants hereinbefore alleged, plaintiff, as as-

signee of Charles J. Mach, has suffered the following damages to the livestock placed in defendants' care, to-wit:

(a) The wrongful and unlawful sale of 31 head of calves; that said calves if returned in the condition defendants agreed to return them would have had a reasonable value of at least $50.00 per head; that Charles J. Mach and plaintiff, as assignee, were thereby damaged in the sum of $1550.00.

(b) The death of 8 calves of a reasonable value of $50.00 per head, caused by the negligence of the defendants hereinbefore alleged, or a damage to Charles J. Mach and plaintiff, as assignee, by defendants of $400.00.

(c) The return of 154 calves in a weak, unhealthy, starved and lean condition due to defendants' negligence which condition caused to Charles J. Mach, and plaintiff as assignee, a loss of $15.00 per head or a damage to plaintiff by defendants' negligence in the sum of $2310.00.

That Charles J. Mach and plaintiff, as assignee, have thereby been damaged by defendants' negligence in a total sum of $4260.00.

Wherefore plaintiff prays judgment against the defendants and each of them upon its first cause of action in the sum of $19,549.00; upon its second cause of action in the sum of $5851.00; upon its third cause of action in the sum of $6748.00; upon its fourth cause of action in the sum of $4568 [fol. 11] and upon its fifth cause of action in the sum of $4260.00, or a total sum of $40,976.00.

Keifer and Keifer, a Co-partnership Composed of J. Warren Keifer, Jr., and Oswin Keifer, Plaintiff, by Perry, Van Pelt and Marti, Its Attorneys.

[File endorsement omitted.]

EXHIBIT "A" TO PETITION

Charter of Regional Agricultural Credit Corporation of Sioux City, Iowa

Washington, D. C.
September 10, 1932.

Whereas, the Reconstruction Finance Corporation deems it desirable to create a regional agricultural credit corpora-

tion in Federal Land Bank District Number Eight, comprising the States of Iowa, Nebraska, South Dakota and Wyoming, and with its principal office in the City of Sioux City, State of Iowa,

Now, Therefore, The Reconstruction Finance Corporation does hereby create, and grant this charter to, the Regional Agricultural Credit Corporation of Sioux City, Iowa; and said Regional Agricultural Credit Corporation of Sioux City, Iowa, is hereby authorized and empowered to do and perform all acts and transact all business which, by implication or otherwise, is permitted legally to be done, performed and transacted by a regional agricultural credit corporation, under and in accordance with the act of Congress, approved July 21, 1932, known as the "Emergency Relief and Construction Act of 1932", and to do all other things incidental thereto, and necessary or appropriate in connection therewith, within the States of Iowa, Nebraska, South Dakota and Wyoming, and within the such other state or states, or parts thereof, as the Reconstruction Finance Corporation, acting by and through its Board of Directors, may at any time and from time to time prescribe or permit.

Said Regional Agricultural Credit Corporation of Sioux City, Iowa, shall be managed by officers and agents appointed by the Reconstruction Finance Corporation, under [fol. 12] such rules and regulations as the Board of Directors of the Reconstruction Finance Corporation may prescribe, which Board of Directors shall also prescribe the provisions of the by-laws of the Regional Agricultural Credit Corporation of Sioux City, Iowa.

In Witness Whereof, the Reconstruction Finance Corporation has caused this charter to be signed by its executive officer, Chairman of its Board of Directors, attested by its Secretary, and has caused its seal to be hereunto affixed this 10th day of September, 1932.

Reconstruction Finance Corporation, (Signed) by Atlee Pomerene, Chairman. (Seal.)

Attest: (Signed) C. R. Cooksey, Secretary.

EXHIBIT "B" TO PETITION

Assignment of Cause of Action

I, the undersigned, hereby transfer and assign for the purpose of collection to Keifer & Keifer, a co-partnership,

composed of J. Warren Keifer, Jr. and Oswin Keifer, all my right, title and interest in a cause of action against the Regional Agricultural Credit Corporation of Sioux City, Iowa, and the Reconstruction Finance Corporation, because of the possession and control of certain livestock by said Regional Agricultural Credit Corporation of Sioux City, Iowa, and the Reconstruction Finance Corporation during the winter of 1934 and 1935, together with all claims, choses in action and rights growing out of the acts while in the possession and control of said corporation.

That said Keifer & Keifer agree as a part of this assignment that out of any and all moneys collected by suit, settlement or otherwise, the pro-rated cost of conducting any litigation necessary will be deducted from the amount recovered upon the count of the petition setting forth the cause of action of each party joining in any such suit; that after the payment of such items of expense and collection as constitutes my prorated share, I shall receive the amount [fol. 13] recovered or received upon the count setting forth my claim against the above mentioned corporations.

Dated this — day of ——, 1936.

—— ——.

In the Presence of: —— ——.

Duly sworn to by Oswin Keifer. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

SUMMONS AND MARSHAL'S RETURNS—Filed December 17, 1936

The President of the United States of America, to the Marshal of the District of Nebraska, Greeting:

You are hereby commanded to notify the Defendants Reconstruction Finance Corporation, a corporation, and Regional Agricultural Credit Corporation of Sioux City, Iowa, a corporation, that they have been sued by Keifer and Keifer, a copartnership composed of J. Warren Keifer, Jr. and Oswin Keifer, in the District Court of the United States, for the District of Nebraska aforesaid, at Omaha, Nebraska; that unless they answer on or before the 18th day of January, A. D. 1937, the petition of said plaintiff, filed against them in the Clerk's office of said court, will be taken as true and judgment rendered accordingly.

[fol. 14] You will make due return of this Summons on or before the 28th day of December, 1936.

Witness, the Honorable Judges of the District Court of the United States for the District of Nebraska, at Omaha this 14th day of December, 1936.

R. C. Hoyt, Clerk, by John Nicholson, Deputy. (Seal.)

Return On Service of Writ

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I hereby certify and return that I served the annexed Summons on the therein-named Reconstruction Finance Corporation, a corporation, 219 Post Office Building by handing to and leaving a true and correct copy thereof with Herbert S. Daniel, Manager, personally at Omaha, in said District on the 16th day of December, A. D. 1936.

J. C. Byrnes, U. S. Marshal, by Earl J. Young, Deputy.

There being no President, Vice-President, Secretary or Treasurer, or Cashier, or Chairman, of the Board or Other Chief Officer of the above named corporation to be found in my District.

Return On Service of Writ

UNITED STATES OF AMERICA,
District of Nebr., ss:

I hereby certify and return that I served the annexed Summons on the therein-named Regional Agricultural Credit Corporation, of Sioux City, Iowa, a Corporation, at 1817 Douglas Street, by handing to and leaving a true and correct copy thereof with J. Oscar Challman, Manager, personally at Omaha, in said District on the 16th day of December, A. D., 1936.

J. C. Byrnes, U. S. Marshal, by Earl L. Young, Deputy.

There being no President, Vice-President, Secretary or Treasurer, Chairman of the Board, or Cashier or other Chief [fol. 15] Officer of the above named Corporation to be found in my District.

(Endorsed): No. 3627. Law Docket. Marshal's Docket No. 7980. United States District Court, District of Ne-

braska, Omaha Division. Keifer & Keifer a co-partnership, etc., vs. Reconstruction Finance Corporation, a corporation et al.

Summons

If Defendant fail to answer, the Plaintiff will take judgment for $40,976.00, and costs.

Perry, Van Pelt & Marti, Atty. for Plaintiff, Lincoln, Nebraska.

[File endorsement omitted.]

In United States District Court

Motion of Defendant, Regional Agricultural Credit Corporation, to Require Plaintiff to Make Petition More Definite and Certain—Filed February 8, 1937

To The Honorable Judges of the District Court of the United States In and For the Omaha Division of the District of Nebraska:

Comes now the defendant Regional Agricultural Credit Corporation of Sioux City, Iowa, and moves the court to enter an order requiring the plaintiff to make its petition more definite and certain in the following respects: (For the sake of brevity the defendant Regional Agricultural Credit Corporation of Sioux City, Iowa, is hereinafter referred to as "R. A. C. C.").

As to the First Cause of Action

1. In paragraph 4 of the said cause of action:

(a) By stating and naming the person or persons representing the defendant R. A. C. C. to whom the plaintiff delivered the cattle as alleged;

(b) By stating the time when and the place where said cattle were so placed;

[fol. 16] (c) By stating and naming the representative or representatives of the defendants who made the oral agreement with the plaintiff as alleged in said paragraph;

(d) By setting out in substance the conversation which is alleged to have resulted in the oral agreement;

(e) By stating the time when and the place where the said conversation took place;

(f) By stating and naming with respect to each and every allegation in said paragraph which partner or partners or what representative or representatives of said plaintiff heard the alleged conversations or witnessed the alleged acts;

2. In paragraph 5 of the said cause of action:

(a) By stating and naming the representative or representatives of the R. A. C. C. who made the alleged false and fraudulent representations and by the alleged coercion fraudulently induced the plaintiff to enter into the alleged contract;

(b) By stating whether the contract was written or oral, and if the contract was written, by setting out the express terms thereof, and if oral, by stating the substance of the conversation or acts upon which plaintiff claims said oral contract was based;

(c) By stating the time when and the place where said conversation or acts took place;

(d) By stating the substance of the conversation, correspondence or acts which the plaintiff contends amounted to fraudulent representations, coercion, and fraudulent inducement;

(e) By stating the time when and the place where said actions, conversations or correspondence took place;

(f) By setting out the terms of said contract which plaintiff claims are unconscionable, unlawful, unenforceable, and unreasonable;

(g) By setting out in particular in what respects the alleged written contract differed from the alleged oral contract;

(h) By setting out in particular the alleged technical terms in said contract or contracts which allegedly caused the plaintiff to be unaware of the waiver or the meaning thereof in said agreement or agreements;

(i) By stating and naming the representative or representatives of the R. A. C. C. who allegedly threatened that

[fol. 17] plaintiff's cattle would be sold immediately, and to whom the said alleged threat was made;

(j) By stating the place where and the time when said threat was made;

(k) By stating and naming with respect to each and every allegation in said paragraph which partner or partners or what representative or representatives of said plaintiff heard the alleged conversations or witnessed the alleged actions;

3. In paragraph 6 of the said cause of action:

(a) By stating and naming the help on said ranch who were employed by the R. A. C. C. who were allegedly inefficient and unskilled;

(b) By stating and naming the alleged representatives of the R. A. C. C. who drove said cattle in to Whitman in alleged long, unreasonable drives at a fast pace, and who allegedly kept the cattle at night where no feed or water was available;

(c) By stating the time and the distance driven;

(d) By stating the places where said cattle were kept at night on said drive;

4. In paragraph 7 of the said cause of action:

(a) By stating and naming the representative or representatives of the defendants who offered to fatten the 186 calves allegedly in the defendants' possession during the winter months;

(b) By stating and naming the partner or partners, representative or representatives of the plaintiff to whom said offer was made;

(c) By stating the place where and the time when said offer was made;

(d) By stating and naming the representative or representatives of the defendants who allegedly agreed for a charge of not more than $7.00 per head to ship, feed, care for, maintain, and so handle said calves that the calves would gain 200 pounds or more per head by late spring of 1935;

(e) By stating whether said agreement was oral or written, and, if written, to set out the exact terms of said agreement, and, if oral, to set out the substance of the conversation which plaintiff claims formed said alleged agreement;

[fol. 18] (f) By stating and naming with what partner or partners, representative or representatives of the plaintiff said alleged agreement was made;

(g) By stating the time when and the place where said alleged agreement was made;

(h) By stating and naming the alleged incompetent, inexperienced and inefficient help employed by the defendants to care for said calves.

As to the Second Cause of Action

5. In paragraph 1 of said cause of action: R. A. C. C. hereby incorporates by reference paragraphs two and three of this motion.

6. In paragraph 3 of the said cause of action:

(a) By stating and naming the person or persons representing the defendant R. A. C. C. to whom the plaintiff delivered the cattle as alleged:

(b) By stating the time when and the place where said cattle were so placed;

(c) By stating and naming the representative or representatives of the defendants who allegedly agreed with the plaintiff as alleged in said paragraph;

(d) By stating whether the agreement was written or oral, and, if written, by setting out the express terms of said agreement, and, if oral, by stating which partner or partners, representative or representatives of the plaintiff made the agreement and the substance of the conversation which plaintiff claims formed said alleged agreement;

(e) By stating the time when and the place where the said agreement was made.

As to the Third Cause of Action

7. In paragraph 1 of the said cause of action: R. A. C. C. hereby incorporates by reference paragraphs two and three of this motion.

8. In paragraph 3 of the said cause of action:

(a) By stating and naming the representative or representatives of the R. A. C. C. in whose hands John R. Jochem allegedly placed 158 head of cattle.

(b) By stating the time when and the place where said cattle were so placed;

[fol. 19] (c) By stating and naming the representative or representatives of the defendants who allegedly agreed with plaintiff as alleged in said paragraph;

(d) By stating and naming the partner or partners, representative or representatives of the plaintiff with whom said agreement was made;

(e) By stating whether said agreement was written or oral and, if written, by setting out the express terms of said agreement, and, if oral, by setting out the substance of the conversation which plaintiff claims formed said alleged agreement;

(f) By stating the time when and the place where said agreement was made.

As to the Fourth Cause of Action

9. In paragraph 1 of the said cause of action: R. A. C. C. hereby incorporates by reference paragraphs two and three of this motion.

10. In paragraph 3 of the said cause of action:

(a) By stating and naming the represent ..ive or representatives of the R. A. C. C. in whose hands Gustav Jochem allegedly placed 78 head of cattle;

(b) By stating the time when and the place where the said cattle were so placed;

(c) By stating and naming the representative or representatives of the defendants who allegedly agreed with plaintiff as alleged in said paragraph;

(d) By stating and naming the partners or partners, representative or representatives of the plaintiff with whom said agreement was made;

(e) By stating whether said agreement was written or oral, and, if written, by setting out the express terms of said

agreement, and, if oral, by setting out the substance of the conversation which plaintiff claims formed said alleged agreement;

(f) By stating the time when and the place where said agreement was made.

As to the Fifth Cause of Action

11. In paragraph 2 of the said cause of action:

(a) By stating and naming what representative or representatives of the defendants made the offer to Charles J. Mach alleged in said paragraph;

[fol. 20] (b) By stating the time when and the place where said offer was made;

(c) By stating and naming what representative or representatives of said defendants made the alleged agreement set out in said paragraph;

(d) By stating the time when and the place where said agreement was made;

(e) By stating whether said agreement was written or oral, and if written, by setting out the express terms of said agreement, and, if oral, by setting out the substance of the conversation upon which the said alleged agreement is founded;

(f) In relation to subdivision (e) of said paragraph of the petition by stating and naming the alleged incompetent, inexperienced, and inefficient help employed by said defendants.

Regional Agricultural Credit Corporation of Sioux City, Iowa, Defendant, by L. W. Powers and C. J. Thurston, by C. L. Thurston, Attorneys.

[File endorsement omitted.]

In United States District Court

Motion of Defendant, Reconstruction Finance Corporation, to Require Plaintiff to Make Petition More Definite and Certain—Filed February 8, 1937

To the Honorable The Judges of the District Court of the United States for the District of Nebraska, Omaha Division:

Comes Now the defendant Reconstruction Finance Corporation and moves the Court to enter an order requiring the plaintiff to make its petition more definite and certain in the manner and form, and in the particulars and respects set out in the motion of the defendant Regional Agricultural Credit Corporation of Sioux City, Iowa, heretofore filed herein on the 8th day of February, 1937, and which motion, with respect to the manner, form, and respects in [fol. 21] which the petition of the plaintiff should be made more definite and certain is by reference thereto made a part of this motion.

Reconstruction Finance Corporation, Defendant, by Francis P. Matthews, Its Attorney.

[File endorsement omitted.]

In United States District Court

Order Sustaining in Part and Overruling in Part Motions to Require Plaintiff to Make Petition More Definite and Certain—Filed March 19, 1937

Now on this 13th day of March, 1937, this matter came on for hearing before the Honorable J. A. Donohoe, one of the Judges of the said district, on the motion of the defendant Regional Agricultural Credit Corporation of Sioux City, Iowa, heretofore filed herein, asking that the plaintiff be required to make its petition more definite and certain in various respects, which motion was also adopted by the defendant Reconstruction Finance Corporation; Mr. Perry Jr. of Perry, Van Pelt and Marti, attorneys for the plaintiff, appeared on behalf of the plaintiff, and Judge L. W. Powers and Mr. C. J. Thurston appeared as attorneys for

the Regional Agricultural Credit Corporation of Sioux City, Iowa, one of the defendants herein, and the Court, being fully advised in the premises and after hearing argument on both sides, finds that said motion should be sustained in part and overruled in part, as follows:

As to the First Cause of Action

As to paragraph 1 of said motion, subdivision:

(a) Sustained.

(b) Overruled as to "By stating the time when" Sustained as to "the place where said cattle were so placed".

(c) Sustained.

(d) Overruled.

(e) Overruled.

(f) Overruled.

As to paragraph 2 of said motion, subdivision:

(a) Sustained.

(b) Sustained as to "stating whether the contract was written or oral and if the contract was written by setting out the express terms thereof" Overruled as to "and if oral [fol. 22] by stating the substance of the conversation or acts upon which plaintiff claims said oral contract was based."

(c) Overruled.

(d) Overruled.

(e) Overruled.

(f) Overruled.

(g) Overruled.

(h) Overruled.

(i) Sustained.

(j) Sustained as to "by stating the place where" Overruled as to "and the time when said threat was made".

(k) Overruled.

As to paragraph 3 of said motion, subdivision:

(a) Sustained.

(b) Sustained.

(c) Overruled.

(d) Overruled.

As to paragraph 4 of said motion, subdivision:

(a) Sustained.

(b) Sustained.

(c) Sustained as to "by stating the place where" Overruled as to "and the time when said offer was made".

(d) Sustained.

(e) Sustained as to "by stating whether said agreement was oral or written, and if written to set out the exact terms of said agreement",
Overruled as to "if oral, to set out the substance of the conversation which plaintiff claims formed said alleged agreement".

(f) Sustained.

(g) Overruled as to "by stating the time when", Sustained as to "the place where said alleged agreement was made".

(h) Sustained.

[fol. 23] As to the Second Cause of Action

As to paragraph 5 of said motion, consistent rulings should be made throughout in each cause of action as to paragraphs two and three of said motion where applicable.
As to paragraph 6 of said motion, subdivision:

(a) Sustained.

(b) Overruled as to "by stating the time when", Sustained as to "the place where said cattle were so placed".

(c) Sustained.

(d) Sustained as to "by stating whether the agreement was written or oral, and if written, by setting out the express terms of said agreement",

Overruled as to "and if oral, by stating which partner or partners, representative or representatives of the plaintiff

made the agreement and the substance of the conversation which plaintiff claims formed said alleged agreement".

(e) Overruled as to "by stating the time when", Sustained as to "the place where the said agreement was made".

As to the Third Cause of Action

As to paragraph 8 of said motion, subdivision:

(a) Sustained.

(b) Overruled as to "by stating the time when", Sustained as to "the place where said cattle were so placed".

(c) Sustained.

(d) Sustained.

(e) Sustained as to "by stating whether said agreement was written or oral and, if written, by setting out the express terms of said agreement", Overruled as to "and, if oral, by setting out the substance of the conversation which plaintiff claims formed said alleged agreement",

(f) Overruled as to "by stating the time when", Sustained as to "and the place where said agreement was made".

As to the Fourth Cause of Action

As to paragraph 10 of the said motion, subdivision:

(a) Sustained.

[fol. 24] (b) Overruled as to "by stating the time when", Sustained as to "and the place where said cattle were so placed".

(c) Sustained.

(d) Sustained.

(e) Sustained as to "by stating whether said agreement was written or oral, and if written, by setting out the express terms of said agreement",

Overruled as to "and, if oral, by setting out the substance of the conversation which plaintiff claims formed said alleged agreement".

(f) Overruled as to "by stating the time when", Sustained as to "and the place where said agreement was made".

As to the Fifth Cause of Action

As to paragraph 11 of said motion, subdivision:

(a) Sustained.

(b) Overruled as to "by stating the time when", Sustained as to "and the place where said offer was made".

(c) Sustained.

(d) Overruled as to "by stating the time when", Sustained as to "and the place where said agreement was made".

(e) Sustained as to "by stating whether said agreement was written or oral, and if written, by setting out the express terms of said agreement", Overruled as to "and, if oral, by setting out the substance of the conversation upon which the said alleged agreement is founded".

(f) Sustained.

Wherefore It Is Considered And Ordered By The Court: That said plaintiff should be, and it hereby is, required to make its petition more definite and certain in the various respects as set out above, and that the motion should be, and hereby is, overruled in part as set out above.

By The Court,

J. A. Donohoe, District Judge.

[File endorsement omitted.]

[fol. 25] In United States District Court

[Title omitted]

Supplemental Petition—Filed March 29, 1937

The original petition filed in the above action is amended by the plaintiff herein in the following respects:

(1) Paragraph 4 of the first cause of action of said petition is amended to read as follows:

(4) That on or about the 21st day of October, 1934, plaintiff delivered to the defendant Regional at Burwell, Ne-

braska, and other places plaintiff is at this time unable to name, through its duly authorized and acting agent, Sid Manning, and others whom plaintiff is at this time unable to name, 388 head of cattle consisting of 197 cows, 5 bulls and 186 calves; that defendants orally agreed through their duly authorized and acting agents, Sid Manning, R. B. Genoways and R. Emmett Brickley, and others, whom plaintiff is unable to name at this time, with plaintiff, to winter said livestock in a careful and efficient manner, provide the livestock with good grass land, plenty of feed of all kinds and water, and to have them cared for by experienced and capable livestock men, and defendants through their agents as above set forth, agreed to return to plaintiff all of said livestock in the spring of the year in as good condition as when turned over to defendants; that defendants through the agents as above alleged, agreed to feed and care for such cattle in a competent manner during the winter of 1934-35.

(2) Paragraph 5 of said first cause of action of said petition is amended to read as follows:

(5) That thereafter and after the aforementioned cattle were placed in the hands of defendant Regional, as above alleged, the defendant Regional, by taking advantage of plaintiff's necessities, induced the plaintiff to enter into a pretended contract, a copy of which is attached hereto, made a part hereof and marked Exhibit A, by the terms of which plaintiff purported to waive damages caused by the defendants; that such a waiver of damages is unconscionable, unlawful and unenforcible because of the unreasonableness of the terms thereof, and because said pretended waiver was [fol. 26] obtained by fraud and coercion as follows, to-wit: That the defendant Regional, by its authorized agents, Sid Manning, R. B. Genoways and R. Emmett Brickley, and others, whom plaintiff is unable to name at this time, represented that said written contract was not materially different from the oral contract under which plaintiff had previously given possession of said livestock to the defendant Regional, represented that if plaintiff would sign said written contract, defendant Regional would winter the cattle with plenty of feed, upon good hay land, with experienced and capable men and in the spring the livestock would be returned in better, or as good, condition as when possession was turned over to the defendant Regional; that by turning said cattle hereinbefore described over to the defendant

Regional, plaintiff would be able to avoid loss of any of his livestock; that plaintiff was unskilled in the use of technical terms and was unaware of the pretended waiver contained in said unconscionable agreement or the meaning thereof; that the aforesaid oral representations were relied upon by plaintiff in signing said purported contract; that said representations were relied upon by plaintiff in executing the contract presented by the Regional; that said representations, and each of the same, were false and untrue and that said purported waiver was obtained by fraud and coercion and is of no force and effect; that defendant Regional further threatened by the agents hereinbefore mentioned at Hyannis and other places which plaintiff is at this — unable to name, and by implication from the financial status existing, that the cattle owned by plaintiff, subject to a mortgage to defendant Regional, would be sold immediately; that said purported waiver is of no force and effect because of said fraudulent and unlawful acts of the defendants and the unconscionable terms of said purported agreement.

(3) Paragraph 6 (a) of said first cause of action of said petition is amended to read as follows:

(6) (a) It knowingly employed inefficient help, to-wit, Richard O'Keefe, Bill Hagadorn and Tom Hitchcock and other help whose names plaintiff cannot at this time state, and unskilled management, to-wit, R. Emmett Brickley and R. B. Genoways as advisors and Jess West as manager for the ranch near Whitman, Nebraska, upon which said cattle were placed by the Regional for wintering.

(4) Paragraph 6 (c) of said first cause of action of said petition is amended to read as follows:

(6) (c) Through its duly authorized and acting agents, Sid Manning, and others whom plaintiff is unable to name [fol. 27] at this time, drove the cattle into Whitman in long, unreasonable drives, at a fast pace; kept the cattle at night where no feed or water was available during said drives.

(5) Paragraph (7) of said first cause of action of said petition is amended to read as follows:

(7) That after the delivery of said 388 head of cattle to the defendants and after their arrival at Whitman, Nebraska, the defendants through duly authorized and acting

agents, R. B. Genoways, Sid Manning and others whom plaintiff is at this time unable to name, at Hyannis and other places which plaintiff is at this time unable to state, further orally offered to J. Warren Keifer and Oswin Keifer to fatten the 186 calves in defendants' possession during the winter months; that defendants through said agents hereinbefore named, orally agreed for a charge of not more than $7.00 per head to ship, feed, care for, maintain and so handle such calves that the calves would gain 200 pounds or more per head by late spring of 1935; that said plaintiff accepted the offer of the defendants and allowed the defendants to move the calves under the above contract.

That the defendants shipped said calves to Melbeta, Nebraska, and other points which plaintiff is at this time unable to name, and that the defendants thereafter negligently failed to care for and maintain said calves but allowed the same to become greatly damaged by the following negligent acts, to-wit:

(a) Defendants placed said calves and the calves of others in a small feed lot; that the calves were crowded and no space for free movement of the calves was available.

(b) That said calves were not fed regularly or properly.

(c) That said calves were not watered regularly or properly.

(d) That the feed was not kept clean, in that manure was allowed to accumulate to a depth of several feet.

(e) That defendants knowingly employed incompetent, inexperienced and inefficient help, to-wit, S. C. Clarke, L. Ed. Genoways and others which plaintiff is unable at this time to name, to care for said calves.

(f) That no care was given said calves during inclement weather; that no sufficient shelter was provided; that the [fol. 28] water supply available, if any, was allowed to become inaccessible through freezing.

(6) Paragraph 3 of the second cause of action of said petition is amended to read as follows:

(3) That on or about the 7th day of November, 1934, Albert Berzina placed in the hands of the defendant Regional, through its duly authorized and acting agents Jess West,

Richard O'Keefe and Tom Hitchcock near Whitman, Nebraska, 108 Head of Hereford Cattle; that because of various head being withdrawn during the winter season and because of the escape of part of the cattle under the control of the defendants to Albert Berzina's premises, Albert Berzina and defendants mutually agreed to fix the number of cattle defendants wintered for said Berzina at 70 head, and that charges for wintering said cattle could be made on the basis of 70 head of cattle; that the defendants orally agreed, through their duly authorized and acting agent, R. Emmett Brickley, near Whitman, Nebraska, with plaintiff to winter said 108 head of livestock in a careful and efficient manner, provide the livestock with water, good grass land, plenty of feed of all kinds and to have them taken care of by experienced and capable livestock men, and defendants agreed to return to Albert Berzina all of said livestock in the spring of the year; that defendants orally agreed, near Whitman, Nebraska, to feed and care for said cattle in a competent manner during the winter of 1934-35.

(7) Paragraph 3 of the third cause of action of said petition is amended to read as follows:

(3) That John R. Jochem on or about the 25th day of October, 1934 placed in the hands of the defendant Regional, through its duly authorized and acting agents, Sid Manning and others whom plaintiff is at this time unable to name, near Brewster, Nebraska, 158 head of cattle as follows: 125 Hereford cows and 33 Hereford branded calves; that the defendants orally agreed, through their duly authorized and acting agents, S. H. McGown, Sid Manning, R. B. Genoways and others, whom plaintiff is at this time unable to state, near Whitman, Nebraska, and other places plaintiff is unable at this time to state, with John R. Jochem to winter said livestock in a careful and efficient manner, provide the live stock with water, good grass land, plenty of feed of all kinds and to have them taken care of by experienced and capable livestock men and defendants agreed to return to John R. Jochem all of said livestock in the spring of the year in as good condition as when turned over to defendants, reason-[fol. 29] able loss excepted; that defendants orally agreed through their duly authorized and acting agents, S. H. McGown, Sid Manning, R. B. Genoways and others whom plaintiff is at this time unable to state, near Whitman, Nebraska, and other places plaintiff is unable at this time to state, to

feed and care for said cattle in a competent manner during the winter of [1934-34].

(8) Paragraph 3 of the fourth cause of action of said petition is amended to read as follows:

(3) That on or about the 25th day of October, 1934 Gustav Jochem placed in the hands of the defendant Regional, through its duly authorized and acting agents, Sid Manning, and others whom plaintiff is at this time unable to name, near Brewster, Nebraska, 78 head of cattle; that the defendants orally agreed, through their duly authorized and acting agents, S. H. McGown, Sid Manning, R. B. Genoways and others whom plaintiff is at this time unable to state, near Whitman, Nebraska, and other places plaintiff is unable at this time to state with Gustav Jochem to winter said livestock in a careful and efficient manner, provide the livestock with water, good grass land, plenty of feed of all kinds and to have them taken care of by experienced and capable livestock men and defendants agreed to return to Gustav Jochem all of said livestock in the spring of the year in as good condition as when turned over to defendants, reasonable loss excepted; that defendants orally agreed through their duly authorized and acting agents, S. H. McGown, Sid Manning, R. B. Genoways and others, whom plaintiff is at this time unable to state, near Whitman, Nebraska and other places plaintiff is unable at this time to state, to feed and care for said cattle in a competent manner during the winter of 1934-35.

(9) Paragraph (4) (d) of said fourth cause of action of said petition is amended to read as follows:

(4) (d) Each cow returned to Gustav Jochem by defendants was of $25.00 less value than these same cattle when delivered to defendants, with a total loss to Gustav Jochem and plaintiff upon the 45 cows returned of $1125.00.

(10) Paragraph 2 of the fifth cause of action of plaintiff's petition is amended to read as follows:

(2) That defendants, through their duly authorized and acting agent, Roy Hylton, and others plaintiff is unable at this time to name, at Mullen, Nebraska, and other places which plaintiff is at this time unable to name, orally offered

to Charles J. Mach to fatten 193 head of his calves during [fol. 30] the winter months; that defendants through their duly authorized and acting agents, Roy Hylton, and others whom plaintiff is at this time unable to name, near Mullen, Nebraska, and other places plaintiff is unable at this time to state, orally agreed for a charge of not more than $7.00 per head to ship, feed, care for, maintain and so handle such calves that the calves would gain 200 pounds or more per head by late spring of 1935; that said Charles J. Mach accepted the offer of the defendants and allowed the defendants to move the calves under the above contract.

That the defendants shipped said calves to Melbeta, Nebraska, and other points plaintiff is at this time unable to state, and that the defendants thereafter negligently failed to care for and maintain said calves but allowed the same to become greatly damaged by the following negligent acts, to-wit:

(a) Defendants placed said calves and the calves of others in a small feed lot; that the calves were crowded and no space for free movement of the calves was available.

(b) That said calves were not fed regularly or properly.

(c) That said calves were not watered regularly or properly.

(d) That the feed lot was not kept clean, in that manure was allowed to accumulate to a depth of several feet.

(e) That defendants knowingly employed incompetent, inexperienced and inefficient help, to-wit, S. C. Clarke, L. Ed Genoways and others whom plaintiff is unable at this time to name to care for said calves.

(f) That no care was given said calves during inclement *whether;* that no sufficient shelter was provided; that the water supply available, if any, was allowed to become inaccessible through freezing.

Keifer and Keifer, a Co-partnership Composed of J. Warren Keifer, Jr. and Oswin Keifer, Plaintiff, by Perry, Van Pelt and Marti, Its Attorneys.

[File endorsement omitted.]

[fol. 31] EXHIBIT "A" TO SUPPLEMENTAL PETITION

Application 46538

J. W. & Oswin Keifer,

Bostwick, Nebraska

Cattle Feeding Contract

The undersigned mortgagor, being unable to provide sufficient feed and water for his livestock, hereby consents that the Regional Agricultural Credit Corporation of Sioux City, Iowa, may take possession of the following described livestock included in his chattel mortgage to said corporation dated the 30th day of September, 1933, to-wit:

Number	Breed	Kind	Age	Brand and Location of Brand
197	Hereford	Cows	4-6 Yrs.	K left hip or—ahead of left hip bone
186	Hereford	Calves	6 months	" " " " "
5	Hereford	Bulls	2-7 yrs.	" " " " "

and agrees to deliver said cattle at the Festus Corrothers ranch adjacent to the Village of Whitman, Grant County, Nebraska.

It is agreed that the said Corporation will furnish feed and care to said livestock until the first day of May, 1935, at which time, provided all the terms and conditions of this contract and of said chattel mortgage have been complied with, the mortgagor shall remove said livestock.

It is understood that the cattle of other mortgagors will be fed and cared for on the said ranch. It is estimated by the parties hereto that the cost of feed, care and shelter for said livestock during said period will be approximately $14.00 per head and the mortgagor agrees to execute and deliver to said corporation his promissory note to pay for said estimated expense and agrees that said note shall be secured by the chattel mortgage hereinbefore referred to and such supplemental chattel mortgage as the said corporation may require. The mortgagor agrees that if the pro rata expense of feed and care for said livestock during said period and advanced by said corporation shall exceed the sum of $14.00 per head, based on the total expense for the care of all livestock fed and cared for by the said corporation on said ranch, he will pay the actual pro rata expense per head and execute and deliver to the corporation his promissory note for the amount of said additional expense, together with such supplemental chattel mortgage as the said corporation may demand. It is further agreed that if

the pro rata expense for the feed and care of said live-
[fol. 32] stock shall be less than the amount of $14.00 per head the said corporation will credit the mortgagor on his said note for the difference between the actual pro rata expense per head and the $14.00 per head herein before provided for.

It is agreed that the cost of feed and care aforesaid shall include the cost of the necessary labor, supervision, hay, pasturage, additional feed, insurance on hay and pasturage and all other necessary expenses incurred by the corporation in feeding and caring for all of the livestock which shall be fed and cared for by it on said ranch.

Inasmuch as this service is undertaken by the corporation as an emergency relief measure in an effort to preserve the said livestock for the benefit of the mortgagor, it is agreed that all loss to said livestock from death, injury, disappearance, or any other cause shall be borne by the mortgagor.

It is agreed that in the event of a default by the mortgagor in the terms and conditions of the chattel mortgage above referred to, or in the event that the corporation shall decide it advisable, the corporation may sell said livestock at public or private sale at any place it shall select and that the mortgagor shall be credited upon his loan from said corporation with the proceeds of said sale after deducting the expense of sale and any amount owing by the mortgagor according to the terms of this agreement.

Dated this 3d day of November, 1934.

—— ——, Mortgagor. Regional Agricultural Credit Corporation of Sioux City, Iowa—Omaha Branch, by —— ——.

Witness: —— ——.

In United States District Court

Demurrer of Defendant, Regional Agricultural Credit Corporation to Petition and Supplemental Petition—Filed April 10, 1937

To the Honorable Judges of the District Court of the United States. In and for the State of Nebraska, Omaha Division:

Comes now the defendant, Regional Agricultural Credit Corporation of Sioux City, Iowa, and demurs to the petition

[fol. 33] and supplemental petition of the plaintiff filed herein on the following grounds, to-wit:

1. That the court has no jurisdiction of the person of the defendant.

2. That the court has no jurisdiction of the subject of the action.

3. That several causes of action are improperly joined.

4. That the petition and supplemental petition do not state facts sufficient to constitute a cause of action against this defendant.

5. That there is a defect of parties defendant.

Regional Agricultural Credit Corporation of Sioux City, Iowa, Defendant, by L. W. Powers and C. J. Thurston, by Franklin L. Pierce, Its Attorneys.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DEMURRER OF DEFENDANT, RECONSTRUCTION FINANCE CORPORATION, TO PETITION AND SUPPLEMENTAL PETITION—Filed April 14, 1937

To the Honorable Judges of the District Court of the United States For the District of Nebraska, Omaha Division:

Comes Now the defendant, Reconstruction Finance Corporation, and demurs to the petition and the supplemental petition of the plaintiff filed herein for the following reasons and upon the following grounds, to-wit:

1

That the Court has no jurisdiction of the subject matter of this action.

2

That several causes of action are improperly joined.

3

That there is a defect or improper joinder of parties defendant.

[fol. 34] 4

That the petition and supplemental petition of the plaintiff heretofore filed herein do not state facts sufficient to constitute a cause of action against this defendant.

Reconstruction Finance Corporation, Defendant, by Francis P. Matthews, Wm. P. Kelley, Its Attorneys.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

OPINION—Filed August 5, 1937

DONOHOE, D. J.:

We have had under consideration the Demurrers of the defendants, which among other things, challenge the jurisdiction of this Court over the persons of the defendants. Oral arguments have been had, and extensive written briefs have been filed.

We have arrived at the conclusion that the defendants are instrumentalities of the United States created by Congress for the purpose of performing governmental functions; that the United States is the real party in interest. (See Reconstruction Finance Corporation vs. Krauss, 12 Fed. Sup. 44, where cases dealing with the question are collected and discussed.); that since the United States may not be sued without its consent, neither can the instrumentalities of the Government be sued without permission of the Congress. No authority has been granted by Congress to sue these defendants in this jurisdiction, and consequently we hold that the Court is without jurisdiction and that it is incumbent upon the plaintiffs to prosecute their claim elsewhere in the mode and manner authorized.

The Demurrers, and each of them, will be sustained and the cause dismissed. Exception will be allowed.

[File endorsement omitted.]

[fol. 35] IN UNITED STATES DISTRICT COURT

Law. 3627

KEIFER AND KEIFER, a Co-partnership Composed of J. Warren Keifer, Jr., and Oswin Keifer,

vs.

RECONSTRUCTION FINANCE CORPORATION, a Corporation, and Regional Agricultural Credit Corporation of Sioux City, Iowa, a Corporation

DECREE—August 5, 1937

In accordance with the views expressed in the Memorandum of the Court, filed herein this date,

It Is Ordered, by the Court, that demurrers of defendants heretofore filed herein, be, and the same are hereby sustained and the case dismissed at costs of the plaintiff, to all of which said plaintiff excepts.

IN UNITED STATES DISTRICT COURT

APPLICATION FOR LEAVE TO FILE AMENDED PETITION—Filed August 26, 1937

Plaintiff respectfully moves the court for an order vacating the dismissal of the above entitled action heretofore entered upon the 5th day of August, 1937 and authorizing and allowing the plaintiff to file an amended petition in the above entitled cause for the following reasons:

(1) That Charles J. Mach, assignor of the 5th cause of action contained in plaintiff's original petition has become a bankrupt and plaintiff desires to eliminate that cause of action from the said petition.

(2) That plaintiff also desire- to make other small corrections and additions to the allegations of the original petition filed herein.

Keifer and Keifer, a Co-partnership Composed of J. Warren Keifer, Jr., and Oswin Keifer, Plaintiff, by Perry, Van Pelt and Marti, Its Attorneys.

[File endorsement omitted.]

[fol. 36] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING APPLICATION FOR LEAVE TO FILE AMENDED PETITION—August 5, 1937

This cause comes on for hearing upon application of plaintiff for leave to file an Amended Petition, said application having been filed herein this date. The Court being fully advised in the premises, and after due consideration thereof, it is by the Court

Ordered, that said application, be, and the same is hereby overruled, to which the plaintiff excepts.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed August 26, 1937

Keifer and Keifer, a co-partnership, composed of J. Warren Keifer, Jr. and Oswin Keifer, above named plaintiff, in connection with and as a part of their petition for appeal assigns the following errors which they aver were committed by the District Court in its rulings, orders and judgments, and upon which plaintiff relies to reverse the judgment and decree herein, as appears by the record:

(1) The court erred in overruling Plaintiff's motion for leave to file an amended petition over the objection and exception of the plaintiff.

(2) The court erred in sustaining the demurrer of the defendants and each of the same to plaintiff's original petition filed in the above entitled cause.

(3) The court erred in sustaining defendants' motion to make definite and to strike, over the objection and exception of the plaintiff.

(4) The court erred in entering a final judgment of dismissal in favor of the defendants over the objection and exception of the plaintiff.

Perry, Van Pelt and Marti, Attorneys for Plaintiff-Appellant.

[File endorsement omitted.]

[fol. 37] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed August 26, 1937

To The Honorable James A. Donohoe, United States District Court Judge:

Keifer and Keifer, a co-partnership, composed of J. Warren Keifer, Jr. and Oswin Keifer, plaintiff above mentioned, feeling aggrieved by the judgment and decree rendered and entered in the above entitled cause of action on the 5th day of August, 1937, does hereby appeal from said judgment and decree to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons set forth in the Assignment of Errors filed herewith, and prays that the appeal be allowed for the correction of said errors and a reversal of said judgment and decree; and that citation be issued as provided by law, and a transcript of the record, proceedings and documents in this cause duly authenticated be sent to the United States Circuit Court of Appeals for the Eighth Circuit under the rules in such case made and provided.

Wherefore, this plaintiff prays an appeal to the United States Circuit Court of Appeals for the Eighth Circuit for the correction of said errors; that an order be made fixing the amount of security to be given in bond without supersedeas to be filed herein and conditioned as the law directs and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to the Circuit Court of Appeals.

Perry, Van Pelt and Marti, Attorneys for Plaintiff-Appellant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed August 26, 1937

Upon the petition of the plaintiff herein, it is ordered that an appeal from the judgment and decree heretofore filed and entered in this cause on the 5th day of August, 1937, be and the same is hereby allowed as prayed for; that the appeal bond filed herewith in the sum of $500.00, be, and is approved and that all proceedings herein be stayed; and that an authenticated transcript of the record, proceed-

ings and documents in this case be transmitted to the United States Circuit Court of Appeals for the Eighth Circuit.

J. A. Donohoe, United States District Judge.

Dated at Omaha, Nebraska, this 26th day of August, 1937.

[File endorsements omitted.]

[fols. 38-39] In United States District Court

Notice of Appeal—Filed August 26, 1937

To The Reconstruction Finance Corporation, a Corporation or Francis P. Matthews, Its Attorney of Record, and to the Regional Agricultural Credit Corporation of Sioux City, Iowa, a Corporation or L. W. Powers and C. J. Thurston, Its Attorneys of Record:

This is to notify you that the plaintiff, Keifer and Keifer, a co-partnership, composed of J. Warren Keifer, Jr., and Oswin Keifer, in cause No. 3627 Law appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment and decree of this court made and entered herein on the — day of August, 1937.

Perry, Van Pelt and Marti, Attorneys for Plaintiff-Appellant.

Due and timely service of the foregoing notice of appeal is hereby acknowledged to have been made and accepted on this 26th day of August, 1937.

Francis P. Matthews, Attorney for Reconstruction Finance Corporation, a Corporation. L. W. Powers & C. J. Thurston, Attorneys for Regional Agricultural Credit Corporation of Sioux City, Iowa, a Corporation.

[File endorsement omitted.]

Bond on appeal for $500.00, approved and filed August 26, 1937, omitted in printing.

[fol. 40] Citation, in usual form, showing service on Francis P. Matthews et al., filed August 26, 1937, omitted in printing.

IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT—Filed August 26, 1937

The clerk will kindly prepare a transcript on appeal for the Circuit Court of Appeals, Eighth Circuit, and to consist of the following:

1. Plaintiff's petition.
2. Summons and Marshal's Return.

[fol. 41] 3. Motions of the defendants to make plaintiff's petition more definite, more certain and to strike.

4. The court's ruling on the motion of defendants to make plaintiff's petition more definite and to strike.
5. Supplemental Petition.
6. Demurrers of the Defendants and each of them to plaintiff's petition.
7. The court's ruling on the demurrer of defendants to plaintiff's petition.
8. Application for Order vacating dismissal and allowing plaintiff to file an amended petition.
9. Order denying Plaintiff's application for leave to file an amended petition.
10. All entries of record.
11. Petition for appeal.
12. Assignment of Errors.
13. Order allowing Appeal.
14. Bond on Appeal and Approval.
15. Notice of Appeal.
16. Citation.
17. This Praecipe.

Perry, Van Pelt and Marti, Attorneys for the Plaintiff-Appellant.

Approved as to form, this 26th day of August, 1937.

L. W. Powers & C. J. Thurston, Attorneys for Regional Agricultural Credit Corporation of Sioux City, Iowa, a Corporation. Francis P. Matthews, Attorney for Reconstruction Finance Corporation, a Corporation.

[File endorsement omitted.]

[fol. 42] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 43] Appearances of counsel omitted in printing.

[fol. 44] In United States Circuit Court of Appeals

Order of Argument—March 14, 1938

This cause having been called for hearing in its regular order, upon application of counsel for the appellee, Reconstruction Finance Corporation, leave is granted to file its brief although with the brief of the other appellee the two briefs exceed the limit of eighty pages under the rule of this Court. Argument was commenced by Mr. Arthur E. Perry for appellant and the hour for adjournment having arrived further argument was postponed until tomorrow morning.

[fol. 45] In United States Circuit Court of Appeals

Order of Submission—March 15, 1938

This cause having been called for further hearing, argument was resumed by Mr. Arthur E. Perry for appellant, continued by Mr. L. W. Powers for appellee Regional Agricultural Credit Corporation of Sioux City, Iowa, and by Mr. Francis P. Matthews for appellee Reconstruction Finance Corporation, and concluded by Mr. Robert Van Pelt for appellant.

Thereupon this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 46] In United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1938

No. 11,019

Keifer and Keifer, a Co-partnership, Composed of J. Warren Keifer, Jr., and Oswin Keifer, Appellant,

vs.

Reconstruction Finance Corporation, a Corporation, and Regional Agricultural Credit Corporation of Sioux City, Iowa, a Corporation, Appellees

Appeal from the District Court of the United States for the District of Nebraska

Mr. Arthur E. Perry and Mr. Robert Van Pelt (Mr. Ernest B. Perry and Mr. Lloyd J. Marti were with them on the brief) for Appellant.

Mr. Francis P. Matthews (Mr. William P. Kelley was with him on the brief) for Appellee Reconstruction Finance Corporation.

Mr. L. W. Powers (Mr. C. J. Thurston was with him on the brief) for Appellee Regional Agricultural Credit Corporation of Sioux City, Iowa.

Before Gardner, Sanborn and Thomas, Circuit Judges

Opinion—July 7, 1938

Gardner, Circuit Judge, delivered the opinion of the Court:

[fol. 47] This is an action at law for the recovery of damages for alleged acts of negligence. Appellant was plaintiff below, and appellees were defendants. Counsel for appellant in their brief, in referring to the parties, say: "The plaintiff and the plaintiff's four assignors will all be referred to herein by the use of the word 'plaintiff.' The defendant, Reconstruction Finance Corporation, will be designated and referred to herein as 'RFC' and the Regional Agricultural Credit Corporation will be designated herein as the 'Regional.'" Counsel for the respective appellees have adopted this suggestion of appellant, and we shall accordingly so designate the parties in this opinion.

The petition sets forth, in separate counts, five alleged causes of action. Of these five causes of action, four are

brought by plaintiff as assignee, while the other is brought by him in his own right. In all of the five causes of action, it is alleged that plaintiff delivered to the Regional Agricultural Credit Corporation certain cattle, which, in violation of its contract duty, it negligently kept, resulting in damage to plaintiff and his assignors. After the cattle were turned over to Regional a written contract was executed, which in terms purported to release Regional from liability in the care of the cattle. So far as the first four causes of action are concerned, it is alleged that this contract containing a release of liability, was obtained by fraud and duress.

The defendants interposed demurrers to the petition, which, while separate, set up substantially the following grounds: (1) that the court had no jurisdiction of the defendants, nor of the subject matter, because the defendants were immune from suit without the permission of Congress; and (2) that the petition and supplemental petition did not state facts sufficient to constitute a cause of action against the defendants, or either of them.

The court sustained the demurrers, expressing the view that the defendants were instrumentalities of the United States, and hence, were immune from suit in an action sounding in tort, without the permission of Congress. The court thereupon dismissed the action, and this appeal is from the judgment of dismissal.

When this case was orally argued, we were of the view that the petition did not state facts sufficient to constitute a [fol. 48] cause of action and therefore the dismissal was properly sustained, regardless of whether the defendants were subject to suit. We then thought that the clause in the contracts of bailment, which purported to release Regional from liability for loss on account of death, injury, or disappearance of the cattle which were the subject of the contract, was a valid limitation on the liability of the bailee, and as there was no statute in Nebraska rendering such a stipulation void, the question was one of general law on which the Federal Court would follow its own decisions. Since the argument of the case, however, the opinion in Erie Railroad Co. v. Tompkins, 82 L. Ed. 787, has been handed down, and under the decision in that case, it is incumbent upon this court to follow the decisions of the highest court of the state in matters of substantive law. Under

may not, by contract, exempt himself from the consequences of his own negligence. School District v. Randall, 5 Neb. 408; Anderson v. Imhoff, 34 Neb. 335, 51 N. W. 854; Gesford v. Star Van and Storage Co., 104 Neb. 453, 177 N. W. 794. The contract was a Nebraska contract and the cause of action arose in that state. The question of the validity of the contract must therefore be decided by the law of Nebraska. It is necessary to consider the question whether the defendants as governmental agencies are immune from action.

So far as the defendant Reconstruction Finance Corporation is concerned, the demurrer was clearly properly sustained. On September 10, 1932, that corporation, pursuant to Act of Congress, created the defendant Regional Agricultural Credit Corporation, of Sioux City, Iowa. By Executive Order, the President transferred control of the defendant Regional Agricultural Credit Corporation from Reconstruction Finance Corporation to the Farm Credit Administration. This order became effective sixty days subsequent to its date. The transfer, however, was actually made approximately a year and a half prior to the time of the transactions and acts complained of by the plaintiff. The Reconstruction Finance Corporation could not, therefore, be held liable.

It remains to consider whether Regional Agricultural Credit Corporation is such a governmental agency as to be immune from suit. The Reconstruction Finance Corporation was authorized by Act of Congress to create "in any of the twelve Federal Land Bank districts where it may deem [fol. 49] the same to be desirable a Regional Agricultural Credit Corporation with a paid up capital of not less than $3,000,000 to be subscribed by the Reconstruction Finance Corporation and paid for out of the unexpended balance of the amount allocated and made available to the Secretary of Agriculture under Section 602 of this Title (Title 15 U. S. C. A.). Such corporations shall be managed by officers and agents to be appointed by the Reconstruction Finance Corporation under such rules and regulations as its Board of Directors may prescribe." Following the enactment of this statute, the Reconstruction Finance Corporation issued a charter to Regional Agricultural Credit Corporation of Sioux City, Iowa, its paid up capital coming from public funds as directed by the Act of Congress. It selected the personnel to have charge of the funds and to loan them to

farmers and stockmen, as provided in the Act. It issued detailed instructions for the guidance of those in charge relative to the method and manner of operation. The operations of Regional were placed on a government basis; its telegrams were given a government rate; its officers and employees were required to subscribe to the standard form of oath required of officers and employees of the United States; the making of any false statements in an application for a loan was made an offense against the Government of the United States. It was not required to pay postage, but was recognized as having the franking privilege; it was relieved of the obligation to pay a capital stock tax because it was an instrumentality of the United States; it was relieved from obligation to pay clerks' and marshals' fees in cases filed in the Federal Courts; it was not required to pay the Federal stamp tax. Regional was not permitted to deposit any of its funds in any bank other than the Federal Reserve Bank or one of its branches, and when the funds were so deposited, they were transmitted to the Treasurer of the United States, who held them, together with the capital funds, under a symbol account in the Treasury of the United States. Moneys loaned by Regional or expended by it were paid by checks and vouchers drawn on the Treasurer of the United States. Upon the reduction of its capital, the funds representing such reduction were deposited with the Treasurer of the United States, to the credit of a revolving fund provided for in Section 84 of the Farm Credit Act of 1933 (12 U. S. C. A. Sec. 1148a). When capital funds of the [fol. 50] Regional were not needed for its operation, they were subject to use as a part of the capital of other Regionals, or for such other purpose as Congress might by statute subsequently direct.

The Government of the United States is not subject to suit without its consent, and this consent is expressed only by a statute permitting suit against it, and the courts can not go beyond the letter of such consent where it has been expressed. United States v. Turner (C. C. A. 8), 47 Fed. (2d) 86; North Dakota-Montana Wheat Growers' Assn. v. United States (C. C. A. 8), 66 Fed. (2d) 573; Posey v. Tennessee Valley Authority (C. C. A. 5), 93 Fed. (2d) 726. It is conceded that there is no statute expressly consenting that Regional may be sued, so that the inquiry is whether from the nature of the agency, an intent on behalf of Congress to make this agency subject to suit may be inferred.

Ballaine v. Alaska Northern Ry. Co. (C. C. A. 9), 259 Fed. 183.

It is to be observed that Regional Agricultural Credit Corporations are not created under the general incorporation laws of any state or territory, which laws would ordinarily make the corporation so formed amenable to action in any court. They are creatures of Federal legislation. They are not managed nor controlled as ordinary corporations. Their capital comes directly from the Federal Government, and it is not invested in capital stock because there is no capital stock. There is no board of directors, and there are no stockholders, as in the case of a commercial corporation. Management is by officers and agents appointed by the Farm Credit Administration, or, prior to the transfer, by the Reconstruction Finance Corporation. In no sense is the corporation a private corporation or a commercial corporation and as such subject to action. Kansas City Bridge Co. v. Alabama State Bridge Corp. (C. C. A. 5), 59 Fed. (2d) 48. In North Dakota-Montana Wheat Growers' Assn. v. United States, supra, this court, in an opinion by the late Judge Kenyon, among other things, said:

"Where the government has intended that one of its agencies shall be subject to suit it has provided therefor in the creative act."

Thus, it will be observed with reference to corporations created by Acts of Congress, that the statutes creating them usually contain specific provision that they may sue and be [fol. 51] sued. An examination of forty-three separate Acts of Congress creating governmental corporations discloses that the statutes creating them, with but six exceptions, provide that they may be sued. An omission to so provide in the legislation pertaining to regional Agricultural Corporations is significant. To argue that they may be sued without such provision would mean that the specific provisions in the statutes creating various governmental agencies, authorizing suit against them, are mere surplusage.

Administrative construction of the statute may be of persuasive force. Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294; United States v. Madigan, 300 U. S. 500. That Regional Agricultural Credit Corporations were recognized as governmental agencies by the Administrative

Department of the Government is evidenced by the fact, already noted, that they were granted government rates on telegrams; their employees were required to subscribe to the standard form of oath required of officers of the United States; they were granted franking privileges, relieved of capital stock tax, and were clearly recognized as and construed to be governmental agencies. The restrictions with reference to their deposit of funds and the covering of their unused capital into the Treasury of the United States further indicate the governmental character of these agencies. They were government agencies, loaning government funds.

It is argued that the activities of these agencies were such as to take them into the realm of private business and divorce them of their sovereign character. But the loaning of money to assist in the agricultural development of the country, or to save the agriculture of the country from loss or disaster, and the collection of the money so loaned, would not, we think, have the effect of converting the Government into a trading partnership, nor put it into private business. In Langer v. United States, 76 Fed. (2d) 817, it was argued that the Reconstruction Finance Corporation was a private business, rather than a government agency. In the course of the opinion in that case we said:

"The question to be determined is whether Congress has created a corporate entity to act as a part of the government [fol. 52] as a political department, or whether it has adopted a corporate form to be separate from and not to be considered as a part of the government."

We there held that the Reconstruction Finance Corporation was a government agency.

See, also: North Dakota-Montana Wheat Growers' Assn. v. United States, supra.

The authorities relied upon by plaintiff are readily distinguishable. Many of them deal with corporations organized under the general incorporation laws of a state or of the District of Columbia. The very laws under which they are incorporated mark them as private corporations and make them amenable to suit. In addition, it is to be noted that in practically all of the incorporations involved in the cases relied upon by appellant, immunity from suit is expressly waived. The case of Sloan Shipyards Corporation v. United States Shipping Board Emergency Fleet Corpo-

ration, 258 U. S. 549, is strongly relied upon. The Emergency Fleet Corporation was organized under the general incorporation laws of the District of Columbia as a private corporation. Those laws, of course, provided that corporations might be sued. That corporation was authorized to carry on a private business for profit, and others than the Government might own its stock. In the course of the opinion, it is, among other things, said:

"At that time the Emergency Fleet Corporation had only the powers given by the incorporation laws of the District. * * * The Shipping Act contemplated a corporation in which private persons might be stockholders and which was to be formed like any business corporation under the laws of the District, with capacity to sue and be sued. * * * The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person * * *."

A number of the other cases cited involved, in the final analysis, the question of the character of the Emergency Fleet Corporation. For example, in United States v. Strang, 254 U. S. 491, which is cited by appellant, the question involved was whether the employment of Strang by the Emergency Fleet Corporation made him an agent of [fol. 53] the Government. The court held that as the corporation was a private corporation, Strang was not an agency of the Government. The court said:

"Its inspectors were not appointed by the President, nor by any officer designated by Congress."

It is to be noted that Regionals are to be managed by officers and employees appointed by the Farm Credit Administration. As Regional is a governmental agency, and Congress has not seen fit to make it amenable to suit by waiving its immunity, we conclude that the court committed no error in sustaining the demurrers to plaintiff's petition, and the judgment appealed from is therefore Affirmed.

[fol. 54] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11019

KEIFER AND KEIFER, a Co-partnership Composed of J. Warren Keifer, Jr., and Oswin Keifer, Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION, a Corporation, and Regional Agricultural Credit Corporation of Sioux City, Iowa, a Corporation

JUDGMENT—July 8, 1938

Appeal from the District Court of the United States for the District of Nebraska

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

[fol. 55] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION OF APPELLANT FOR REHEARING—Filed July 21, 1938

Appellant respectfully moves the court to grant a rehearing in the foregoing case and to vacate and set aside the opinion and judgment of the court rendered on July 7, 1938, upon the following grounds, to-wit:

[fol. 56] (1) For failure to consider and grant appellant's application for leave to amend the petition made in the trial court and to reverse the trial court's order refusing appellant permission so to do.

(2) For refusal to reverse the order of the trial court sustaining the demurrer of the appellees and each of the same to appellant's petition.

(3) For refusal to reverse the order of the district court entering a final judgment of dismissal in favor of the defendants and appellees.

(4) For error in holding that the defendant and appellee Regional Agricultural Credit Corporation of Sioux City, Iowa, was immune from suit.

The court did not have before it for consideration the excellent, able and correct decision on this point rendered by the Minnesota Supreme Court in the case of Casper v. R. A. C. C., 278 N. W. 896 because the cited case was decided after the submission of the pending case to this court. The Minnesota case expressly refuses to follow the ruling of the United States District Court deciding the pending case, and in a carefully reasoned opinion, abundantly supported by accepted authorities, answers every argument made by the Regional and presented by this court in its opinion in this case. We quote the following from the opinion of the cited case:

"Regional agricultural credit corporations are not immune from suit. Reconstruction Finance Corporation, Art. Sec. 201 (e), 15 U. S. C. A. Sec. 605b (e). (Syl. 2).

"Defendant cites and relies on Keifer & Keifer v. Reconstruction Finance Corporation et al., 22 F. Supp. 918, decided August 5, 1937, by the United States District Court, District of Nebraska, holding that a regional agricultural credit corporation may not be sued without the consent of Congress and that Congress has not given such consent. With utmost deference to the court which decided that case, we refuse to follow it because we think congressional consent to suit has been given.

* * * * * * *

[fol. 57] "A grant of corporate existence is itself a grant of power to sue and be sued. Those incidents, unless expressly withheld, exist without specific enumeration. 3 Thompson, Corporations, 3d Ed., Sec. 2180, p. 821; 1 Cook, Corporations, 8th Ed. Sec. 3, p. 16; 2 Kent's Commentaries, 13th Ed., 369; 1 Chitty's Blackstone 395, where it is stated that the incidents of a corporation, including the power to sue and be sued, implead and be impleaded, 'are necessarily and inseparably incident to every corporation * * * as soon as a corporation is duly erected * * *'; 6 Viner's

Abr. 265 (G), 'When a corporation is duly created, all other incidents are tacitly annexed. As if the king makes a general corporation * * * without any words of license * * * yet the corporation may purchase, plead, or be impleaded well enough; for that by the making of the corporation all those necessary incidents are included'; 8 Halsbury's Laws of England 67, 68; 7 R. C. L. 689, Sec. 690; Hancock v. Louisville Railroad Co., 145 U. S. 409, 12 S. Ct. 969, 36 L. Ed. 755; McLoud v. Selby, 10 Conn. 389, 27 Am. Dec. 689; De Haas v. Pennsylvania R. Co., 261 Pa. 499, 104 A. 733; The Case of Sutton's Hospital, 5 Coke, Part X, p. 285. This was the settled rule prior to the decision in the case of Sutton's Hospital in 1612, supra, in which the court said that the power to sue and be sued is one of the incidents of a corporation and that when a corporation is duly created, the 'incidents are tacitly annexed' including the power to sue and be sued, implead, and be impleaded. The expression used in Sutton's Case, that a corporation may sue and be sued, implead, and be impleaded, is still the language of the books. The power of defendant to sue and be sued is implied from the very fact that it is a corporation, the same as though the power had been expressly stated and granted. Such power is a part of defendant's very corporate existence.

* * * * * * *

"The inference that defendant is subject to suit is supported by the fact that its creator, the Reconstruction Finance Corporation, is itself subject to suit. The theory on which immunity is sustained is that the creator has transmitted to the creature its sovereign immunity. The government withheld such immunity from the Reconstruction Finance Corporation. It thus indicated a general policy of subjecting the Reconstruction Finance Corporation and its [fol. 58] property to suit and judicial process. True, defendant derives its powers from the statute, but it is hardly to be inferred that immunity would be granted to the creature where it is withheld from the creator. The fact that defendant was created a corporation with all incidents of a corporation would seem to be decisive in the light of other considerations."

Casper v. Regional Agr. Credit Corp., 278 N. W. 896 (Minn.).

The entire opinion of the cited case is carefully written and we believe, because of its inherent justice and logic, it is decisive of the question decided therein and we respectfully submit that a careful examination of the opinion in the cited case will require this court to reverse its ruling and opinion in this case.

The opinion rendered in this case finds only that the Regional is a governmental agency and from that point and from the fact that the employees take an oath of office, and the corporation uses a "franking privilege" etc., the court determines that no authority to sue the defendant Regional exists. Other governmental agencies, which are corporations, are because of their corporate existence, subject to suit. From the incorporation itself, they become subject to suit. It should be noticed that Congress did not create the defendant Regional. The defendant Regional was created by the R. F. C. The congressional statement that the Regional was to be a corporation is Congress' only expression on the question of the defendant Regional's immunity from suit. What form the corporate organization by the R. F. C. took could not effect the congressional intent that the Regional be organized as a corporation and as such be "*presumably subject to suit.*"

These matters do not determine whether the defendant Regional is subject to suit. The Fleet Corporation, the Panama Railroad, the R. F. C. and other corporate governmental agencies have these exemptions and privileges but are held subject to suit. The question of a corporation hav- [fol. 59] ing these exemptions and privileges is entirely beside the point as to whether or not they have immunity from suit.

While we hereinafter respectfully urge that the submission of evidence in the form of an appendix to a brief is improper, however, in view of the recitations from such an appendix in the opinion in this case, we cite the following from a similar appendix attached to the brief of the defendant Regional before the trial court where the memorandum was attached.

Exhibit IX of the defendant Regional's brief filed with this court refers to a "memorandum attached", although it is not so attached. The memorandum contains the following:

"A striking analogy between the United States Shipping Board Emergency Fleet Corporation and that of the Regional Agricultural Credit Corporation appears

• • • • • • •

"While the government did not directly organize the Regional Agricultural Credit Corporation, it granted the power to the Reconstruction Finance Corporation to do so."

Congress authorized the Shipping Board (an incorporated governmental agency, not subject to suit) to form the United States Shipping Board Emergency Fleet Corporation. That was the only congressional expression of intent as to suability.

The United States Shipping Board has been repeatedly held subject to suit and distinguished from its creator, the Shipping Board, which was held not subject to suit. Sloan Shipyards Corp. v. U. S. Shipping Board, 258 U. S. 549, 42 S. C. R. 386; United States Shipping Board Emergency Fleet Corp. v. Eichberg, 14 Fed. (2d) 248; U. S. Shipping Board Emergency Fleet Corp v. Tabas, 22 Fed. (2d) 398; U. S. Shipping Board etc. v. Harwood, 281 U. S. 519, 50 S. C. R. 372.

The United States Food Administrator (an unincorporated governmental agency not subject to suit) created the [fol. 60] United States Grain Corporation. The distinction as to immunity of the organizing agency and the corporation was examined and the corporation held subject to suit.

Phillips v. U. S. Grain Corp., 279 Fed. 244;
U. S. Grain Corp. v. Phillips, 43 S. Ct. R. 283, 261 U. S. 106.

The United States Food Administrator also formed the United States Sugar Equalization Board, Incorporated. The distinction between a governmental board and a corporation was recognized and the corporation held subject to suit.

Federal Sugar Refining Co. v. U. S. Sugar Equalization Board, Inc., 268 Fed. 575.

The Isthmian Canal Commission (an unincorporated governmental agency, not subject to suit) operated through the Panama Railroad Company, a corporation. The distinction

has been repeatedly recognized and the corporation held subject to suit.

Salas v. United States, 234 Fed. 842 (C. C. A. 2);
Panama R. Co. v. Curran, 256 Fed. 768;
Panama R. Co. v. Minnix, 282 Fed. 47.

The Farm Board (an unincorporated governmental agency, held not subject to suit) formed various marketing corporations and this court held those marketing corporations "were distinct entities, duly incorporated, and undoubtedly entitled to sue and be sued as other corporations."

No. Dakota-Montana Wheat Growers Assn. v. United States, 66 Fed. (2d) 573, 92 A. L. R. 1484.

Similar distinctions have been recognized as to the Director of Air Craft Production organizing the United States Spruce Corporation, and the Secretary of War organizing the Inland Waterway Corporation.

See Olson v. U. S. Spruce Corp., 276 U. S. 462, 45 S. C. R. 357.

In the seven examples just mentioned the corporations were formed, created and used by an administrative agency [fol. 61] without any congressional expression as to whether such corporations should be subject to, or immune from, suits. In each instance the corporation was held subject to suit because of its incorporation and despite the immunity from suit of the body organizing such corporations.

In the case of the Regionals there is a similar congressional silence as to the corporations being subject to, or immune from, suit. But Congress required a corporation be formed and further directed creation of the corporation by the R. F. C., itself an incorporated body and subject to suit.

The distinction existing between these seven corporations and the Regional, so far as any congressional expression as to suability, conclusively shows a stronger case as to the Regional being subject to suit than any other corporation. Yet this court would hold that Congress intended all seven of these corporations to be subject to suit and the Regional corporation exempt from suit. We respectfully submit that the opinion of the Minnesota Supreme Court is correct and that the decision of this court is based upon a distinction which is actually nonexistent.

(5) For Error Committed in Considering Evidence Tendered by the Regional in the Appendix to Its Brief.

That the matters of evidence submitted by the Regional in the appendix to its brief are not properly before the court and that it was error for the court to base its decision thereon is evident. This matter came before the court upon the defendant Regional's demurrer to the plaintiff's petition. Whether the defendant Regional received the governmental rate on telegrams, used the "franking" privilege, were relieved of capital stock tax or whether the Regional's employees took an oath, were matters not before the court and could not be considered by the court without plaintiff being given an opportunuity to introduce evidence on these points. Nevertheless a large portion of the opinion in this case is used in discussing matters on which "evidence" was [fol. 62] offered in the appendix of the defendant Regional's brief.

We further call to the court's attention that the matters set forth in the appendix to the defendant Regional's brief are not within the rule allowing the court to take judicial notice of rules and regulations under the cases cited in the defendant Regional's brief and are not an administrative construction of the statute which it is proper to consider on demurrer, under the rule of the cases cited by the court in support of that proposition for the following reasons:

(1) The matters contained in the appendix are not by any stretch of the imagination rules and regulations under the provisions therefor authorized by Congress.

(2) The matters set forth in the appendix are inter-office communications which are by the very terms thereof "confidential, not for publication", and we call to the court's attention that that provision is expressly set forth in the appendix in regard to exhibits 2, 4, 5, and 11 and is by the very substance of the other exhibits, shown to be true of them also. Such confidential communications between Washington bureaus cannot effect the immunity from suit of the defendant Regional, particularly as against the plaintiff herein against whom such secret communications would not even be admissible in evidence.

(3) The matters contained in the appendix do not involve a construction of a statute because the matters set forth therein have been repeatedly held separate and dis-

tinct problems from the problem as to whether the particular corporation was subject to suit. See Federal Land Bank of St. Louis v. Priddy, 295 U. S. 229, 55 S. C. R. 705; Sloan Shipyards Corp v. United States Shipping Board, 42 S. C. R. 386, 258 U. S. 549, 66 L. Ed. 762; Olson v. United States Spruce Corp., 267 U. S. 462, 45 S. C. R. 357, 69 L. Ed. 738; United States Shipping Board Emergency Fleet Corp. [fol. 63] v. Harwood, 281 U. S. 519, 524-526, 50 S. C. R. 572, 74 L. Ed. 1011; Casper v. Regional Agri. Credit Corp., 278 N. W. 896 (Minn.).

The provisions in regard to lending policies shown in exhibit 2 of the appendix to d fendant Regional's brief, shows that the Regional is by its very nature competitive with private business and upon that ground if no other is subject to suit. The organization of the Regional was by the R. F. C. and no expression of the Regional's immunity from suit is made either by Congress or by the charter issued by the R. F. C. Under the authority given by Congress, the Regional could have been organized under the law of any state of the United States or under the laws of the District of Columbia. Compare with Federal Sugar Refining Co. v. U. S. Sugar Equalization Board, Inc., 268 Fed. 575.

The holding of this court that the Regional is a governmental agency is not decisive of the question of whether the defendant Regional is immune from suit. The questions to be decided are—Did Congress make the Regional subject to suit or did Congress make the Regional immune from suit? Where as here, Congress has taken no direct position upon the matter, and has allowed the R. F. C. to organize a corporation as it saw fit, matters decisive of the question are:

(1) The R. F. C., itself a governmental agency subject to suit, was authorized to create the Regional.

(2) The Regional was authorized to engage in commercial enterprises, authorized to lend money and thus inferentially empowered to bring suit to collect the same and to be subject to suit as an ordinary business corporation.

(3) A separate corporation was to be formed rather than a board or commission as the Shipping Board, Grain Board, Sugar Equalization Board, etc., exempt from suit as distinguished from their comparable corporations organized by the Boards and Commissions which corporations were held to be subject to suit.

[fol. 64] (4) The Regional was under no circumstances immune from suit for a tort committed by it and the plaintiff is not "cut off" from a remedy against the agents that did the wrongful act.

The case of Casper v. Regional Ag.. Credit Corp., supra, arrives by a logical and unanswerable process of reasoning at the conclusion that Congres: expressly shows its intention that the Regional be subject to suit and if consideration is given to the reasoning of that opinion, the ruling in this case must be the same; that the Regional is subject to suit.

Respectfully submitted, Ernest B. Perry, Robert Van Pelt, Lloyd J. Marti, Arthur E. Perry, Attorneys for Appellant.

[fol. 65] Certificate

I, Ernest B. Perry, undersigned counsel for petitioner, hereby certify that in my opinion the foregoing petition for rehearing in said cause is well founded and is not made for the purpose of delay.

Ernest B. Perry, Counsel for Petitioner.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—August 9, 1938

The petition for rehearing filed by counsel for appellant in this cause having been considered, It is now here ordered by this Court that the same be, and it is hereby, denied.

In United States Circuit Court of Appeals

Motion of Appellant for Stay of Mandate—Filed August 18, 1938

Keifer & Keifer, etc., Appellant, respectfully moves the court to stay the execution or enforcement of the judgment entered by this court on July 7, 1938 affirming the judgment of the United States District Court for Nebraska, Omaha Division, and further moves the court to stay the issuance

of the mandate in the above entitled action, said stay to be conditioned upon appellant perfecting an appeal from the judgment of this court of July 7, 1938 on or before the 6th day of October, 1938, and upon the perfection of said appeal said stay is to be until such time as a petition for writ [fol. 66] of certiorari is refused by the United States Supreme Court or until an affirmance of the opinion and judgment of this court by said United States Supreme Court upon the following grounds, to-wit:

(1) That appellant plans intends and will take an appeal from the judgment of this court to the United States Supreme Court by means of a petition for writ of certiorari.

Keifer & Keifer, a Co-partnership, Appellant, by Perry, Van Pelt and Marti, Their Attorneys.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—August 22, 1938

On Consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 67] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 68] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 24, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, limited to the first question presented in the petition.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Ernest B. Perry. File No. 42,849. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 364. Keifer and Keifer a Co-partnership, Composed of J. Warren Keifer, Jr., and Oswin Keifer, petitioner, vs. Reconstruction Finance Corporation and Regional Agricultural Credit Corporation of Sioux City, Iowa. Petition for a writ of certiorari and exhibit thereto. Filed September 20, 1938. Term No. 364, O. T., 1938.

FILE COPY

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SEP 20 1938
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 364

KEIFER AND KEIFER, A CO-PARTNERSHIP, COMPOSED OF J. WARREN KEIFER, JR., AND OSWIN KEIFER,

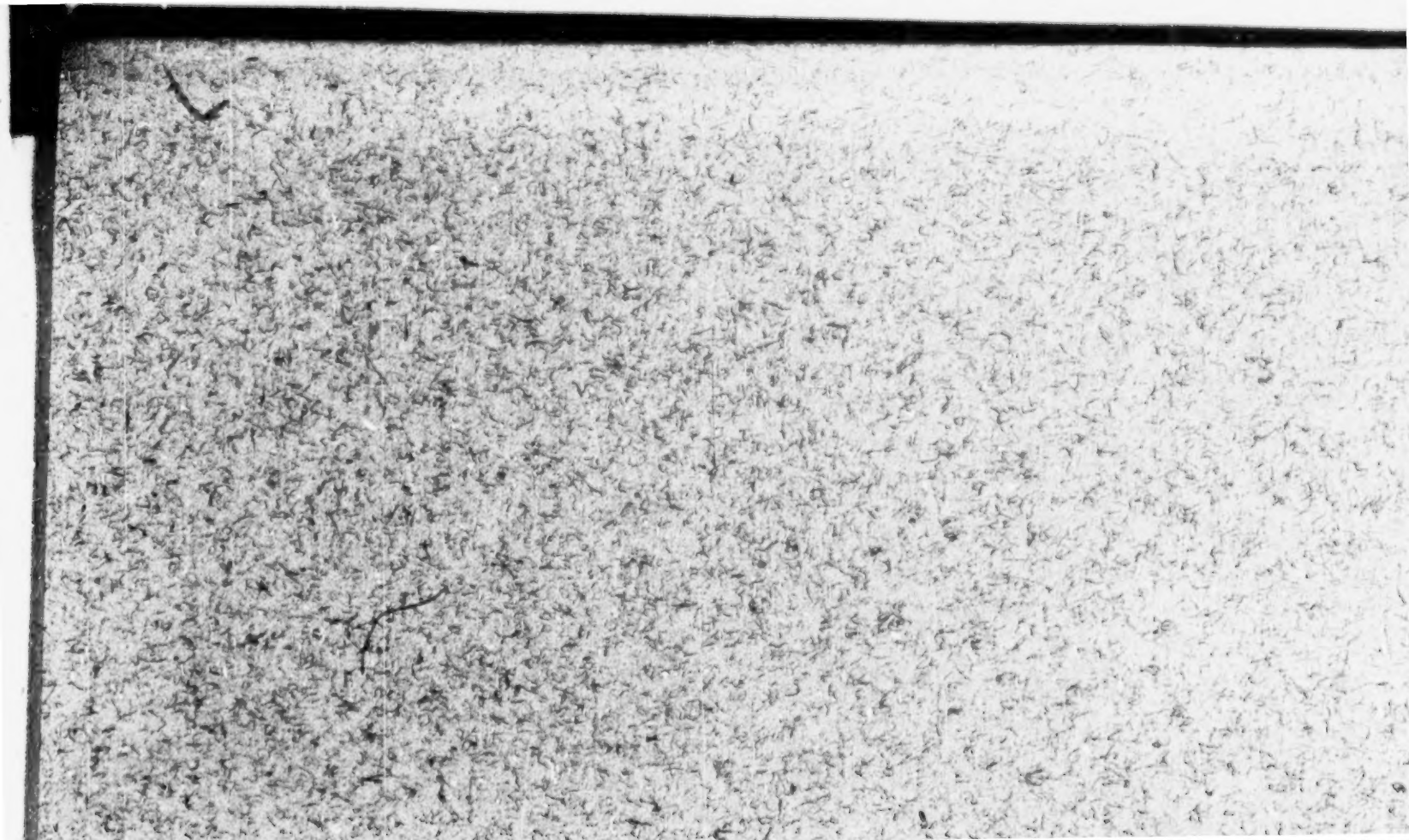
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, AND REGIONAL AGRICULTURAL CREDIT CORPORATION OF SIOUX CITY, IOWA, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ERNEST B. PERRY,
ROBERT VAN PELT,
LLOYD J. MARTI,
ARTHUR E. PERRY,
JOSEPH P. O'GARA,
Attorneys for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 364

KEIFER AND KEIFER, A CO-PARTNERSHIP, COMPOSED OF J. WARREN KEIFER, JR., AND OSWIN KEIFER,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, AND REGIONAL AGRICULTURAL CREDIT CORPORATION OF SIOUX CITY, IOWA, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, The Supreme Court of the United States:

This is an application for a writ of certiorari for review of the decree of the United States Circuit Court of Appeals for the Eighth Circuit affirming a decree of the United States District Court for the District of Nebraska, Omaha Division.

I. Summary Statement of the Matter Involved.

This is an action at law brought in the District Court of the United States for the District of Nebraska, Omaha Division, by the petitioner herein against the respondents.

The petition sets forth in separate counts five causes of action. Of these five causes of action, four are brought by the petitioner as assignee while the other is brought by the petitioner in its own right. For the sake of brevity the petitioner and the petitioner's four assignors will be referred to herein as "petitioner" and the respondent Reconstruction Finance Corporation, a corporation, will be designated and referred to herein as "RFC" and the respondent Regional Agricultural Credit Corporation of Sioux City, Iowa, will be designated and referred to herein as the "Regional".

In all of the five causes of action it is alleged that petitioner delivered to the "Regional" certain cattle which the "Regional", as mortgagee, was to keep during the winter of 1934-35 and care for in such a manner as to enhance the value and condition of said cattle. The "Regional" negligently failed to keep, shelter, feed, water and care for said cattle, resulting in damage to the "petitioner" (R. 1-13 and 25-32). The respondents interposed separate demurrers to this complaint (R. 32-33) which set up substantially the following grounds: (1) That the court had no jurisdiction of the respondents or the subject matter, because the respondents were immune from suit without the permission of Congress, and (2) that the petition did not state facts sufficient to constitute a cause of action against respondents or either of them.

The "Regional" was created by the "RFC" pursuant to Section 605B(e) of the Act under which the "RFC" was organized (15 U. S. C. A., Secs. 601-617). This Act authorized the "RFC" to "create" a Regional Agricultural Credit Corporation in each of the twelve Federal Land Bank districts, with a paid up captial of not less than $3,000,000.00 to be subscribed by the "RFC" and paid out of the unexpended balance of the amount allocated and made available

to the Secretary of Agriculture. The Act provided that the officers and agents should be appointed by the "RFC". This function was later transferred to the Governor of the Farm Credit Administration, pursuant to executive order No. 6084, dated March 27, 1933, effective on May 27, 1933. The same order transferred to the Governor of the Farm Credit Administration control of the funds allocated by the Act of the Secretary of Agriculture.

The Act in express terms declared that the "RFC" should have capital stock, corporate organization, sue and be sued, a limited duration, and numerous powers and purposes (15 U. S. C. A., Sec. 604). It provided that a Regional Agricultural Credit Corporation shall have capital (not capital stock), corporate organization and power to make loans and advances for agricultural and livestock purposes, charge interest thereon and to rediscount its paper. The Act does not in express terms declare the "Regional" may sue or be sued, nor does it limit its duration.

II. Rulings of the Lower Courts.

The District Court sustained the demurrers, expressing the view that the defendants were instrumentalities of the United States and hence were immune from suit in an action sounding in tort, without the permission of Congress (R. 34). The District Court thereupon dismissed the action (R. 35) (*Keifer & Keifer* v. *R. F. C. and Regional Agricultural Credit Corp.*, 22 Fed. Sup. 918).

On appeal to the United States Circuit Court of Appeals for the Eighth Circuit that court on July 7, 1938, entered an opinion and judgment in which it held that the petition stated facts sufficient to constitute a cause of action under the Nebraska law against the defendant "Regional" but held that the transfer of the control of the "Regional" by executive order relieved the "RFC" of any liability and that the respondent "Regional" was a governmental agency

with immunity from suit and affirmed the dismissal by the District Court (R. 45-51; 97 F. (2d) 812).

III. Questions Presented.

(1) Whether the "Regional", a corporation created by the "RFC" pursuant to an act of Congress with capital of $3,000,000.00 subscribed and paid by the "RFC", whose officers and agents were appointed by the "RFC" until this function was transferred to the Farm Credit Administration by executive order No. 6084, dated March 27, 1933, and which "Regional" is authorized by said congressional act, 15 U. S. C. A. 605B(e) to have capital (not capital stock), corporate organization, and power to make loans and advances for agricultural and livestock purposes (charging interest thereon) and to rediscount its paper and which Act of Congress did not, in express terms, declare that the "Regional" might sue or be sued and which "Regional" was engaged at the time of the tortious act complained of in wintering livestock upon which the "Regional" had a chattel mortgage, upon a ranch operated by it, is subject to suit for a tort committed by it.

(2) Whether the "RFC" is subject to suit as principal for the "Regional's" tortious act on the ground, the "Regional" was agent of the "RFC" as alleged in the complaint.

(3) Whether the District Court erred in sustaining the demurrers of respondent, in denying "petitioner" leave to amend and in dismissing "petitioner's" complaint.

IV. Reasons Relied Upon for Allowance of the Writ.

Several proceedings are pending in which the questions involved in this case have been raised. Regional Agricultural Credit Corporations have been created by the "RFC" in each of the twelve Federal Land Bank districts except

the first and second and all of these "Regionals" have capital of $3,000,000.00 and have dealt as business corporations making loans to farmers and stockmen. In view of litigation already pending and likely to ensue against the "Regional" and other Regional Agricultural Credit Corporations in which the exact question would be involved it is proper that this Court at its early opportunity pass on the question of whether these corporations are subject to suit.

The Circuit Court of Appeals has construed the statute authorizing the "RFC" to form the "Regional" to mean that the "Regional" is not subject to suit. In refusing to hold otherwise the Circuit Court of Appeals decided an important question of Federal law, which has not been, but should be settled by this Court.

The Circuit Court has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

The Circuit Court of Appeals held that the "Regional" partakes of the sovereign immunity from suit. The representative decisions of this Court cited in this brief hold that other governmental corporations similarly organized are subject to suit.

One of the ten Regional Agricultural Credit Corporations, organized under the same act as the "Regional", has been held to have no immunity from suit.

There exists a conflict between the Circuit Court of Appeals and the highest State court of Minnesota upon the construction of the Federal statute, 15 U. S. C. A. 605B(e) and the immunity claimed thereunder and upon which question this Court is the final arbiter.

The Regional Agricultural Credit Corporation of Minneapolis, Minnesota, was expressly and specifically held subject to suit by the Supreme Court of the State of Minnesota in a particularly able and well reasoned decision.

Casper v. *Regional Agricultural Credit Corporation* (Minn.), 278 N. W. 896.

Representative decisions of this Court involving other similar corporations in which the corporations were held liable to suit are set forth hereafter and will be discussed more fully in the brief.

The United States Shipping Board Emergency Fleet Corporation has been held subject to suit by this Court. *Sloan Shipyards Corporation* v. *U. S. Shipping Board*, 258 U. S. 549, 42 Sup. Ct. Rep. 386, 66 L. Ed. 762; *U. S. Shipping Board Emergency Fleet Corporation* v. *Harwood*, 281 U. S. 519, 50 Sup. Ct. Rep. 372, 74 L. Ed. 1011; *U. S.* v. *Strang et al.*, 254 U. S. 491, 41 Sup. Ct. Rep. 165, 65 L. Ed. 369.

United States Grain Corporation has been held subject to suit. *U. S. Grain Corporation* v. *Phillips*, 261 U. S. 106, 43 Sup. Ct. Rep. 283, 67 L. Ed. 552.

United States Spruce Corporation has been held subject to suit. *Olson* v. *U. S. Spruce Corporation*, 267 U. S. 462, 45 Sup. Ct. Rep. 357, 69 L. Ed. 738.

V. Prayer for the Writ.

For these reasons it is respectfully submitted that this petition for writ of certiorari to review the decree and order of United States Circuit Court of Appeals for the Eighth Circuit, should be granted.

KEIFER AND KEIFER, a Co-partnership,
Composed of J. Warren Keifer, Jr.,
and Oswin Keifer, *Petitioner*,

By ERNEST B. PERRY,
ROBERT VAN PELT,
LLOYD J. MARTI,
ARTHUR E. PERRY,
JOSEPH P. O'GARA,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. Opinions.

One opinion was delivered by the District Court. It was written by District Judge J. A. Donohoe and filed August 5, 1937. It appears on page 34 of the record and is reported in 22 Fed. Sup. 918. The opinion of the Circuit Court of Appeals (Circuit Judges Gardner, Sanburn and Thomas, Judge Gardner writing) was filed July 7, 1938, and appears at pages 44-50 of the record. It is reported in 97 F. (2d) 812.

II. Jurisdiction, Applicable Statutes and Timeliness.

A judgment was rendered by the Circuit Court of Appeals on July 8, 1938; upon July 21, 1938, a petition for rehearing was filed by the petitioner before said court and that on August 9, 1938, an order was entered by said court denying the petition for rehearing. This petition for writ of certiorari is filed under the provisions of 28 U. S. C. A., paragraph 347 (Judicial Code, paragraph 240, as amended).

III. Facts in Brief.

The facts are stated in the petition (R. 1-13 and 25-32) and in the petition for writ of certiorari. We emphasize that the Regional Agricultural Credit Corporation was formed as a corporation and was created by the "RFC"; that the "RFC" was a government-owned corporation expressly authorized to sue and be sued; that the Regional was authorized to transact ordinary business, specifically being authorized to make loans to farmers and stockmen and to charge interest therefor; that petitioner's cause of action is based upon a *tort*.

IV. ARGUMENT.

1. Whether the Regional is subject to suit for a tort.

The holding of the Circuit Court that the Regional is immune from suit is the sole basis for the dismissal of petitioner's cause of action.

(A) The question as to whether the Regional Agricultural Credit Corporations are subject to suit is an important question of Federal law which has not been, but should be, settled by this Court.

The statute authorizing the Regional and directing the "RFC" to create "Regionals" is as follows:

> "The Reconstruction Finance Corporation is further authorized to create in any of the twelve Federal Land Bank districts where it may deem the same to be desirable a Regional Agricultural Credit Corporation with a paid up capital of not less than $3,000,000 to be subscribed by the Reconstruction Finance Corporation and paid for out of the unexpended balance of the amount allocated and made available to the Secretary of Agriculture under Section 602 of this Title. Such corporations shall be managed by officers and agents to be appointed by the Reconstruction Finance Corporation under such rules and regulations as its Board of Directors may prescribe. Such corporations are hereby authorized and empowered to make loans or advances to farmers and stockmen, the proceeds of which are to be used for an agricultural purpose (including crop production), or for the raising, breeding, packing, or marketing of livestock, charge such rates of interest or discount thereon as in their judgment are fair and equitable, subject to the approval of the Reconstruction Finance Corporation, and to re-discount with the Reconstruction Finance Corporation and the various federal reserve banks and federal intermediate credit banks any paper which they acquire which is eligible for such purpose. All expenses in-

curred in connection with the operation of such corporations shall be supervised and paid by the Reconstruction Finance Corporation under such rules and regulations as the Board of Directors may prescribe."

Title 15, Section 605B (e), U. S. C. A., Sup. 107, 108.

This congressional act has never been interpreted by this Court with reference to whether Regional Agricultural Credit Corporations are subject to suit. A ruling by this Court upon this question is necessary to determine finally the claim of immunity from suit made by the Regional formed under the above cited Federal statute.

Under Section 237B of the Judicial Code, this matter is specifically made subject to the jurisdiction of this Court by certiorari: Any cause "* * * where any * * * immunity is specially set up or claimed by either party under the Constitution or any treaty or statute of, or commission held or authority exercised under the United States". This case falls directly within this sphere.

The matter is important becauses it involves a government-owned corporation of which there are at least ten exact replicas, one of such Regional Agricultural Credit Corporations, operating in ten of the twelve Federal Land Bank districts, covering almost every part of the United States. Each of said Regional Agricultural Credit Corporations has made loans and transacted business running into many millions of dollars. Litigation has and will result in which the question raised herein will be in issue. Twenty-five other parties suffered loss in the same transaction and at the same time of the petitioner's loss through acts of the Regional. There is pending in the Minnesota State court the action of *John Casper* v. *Regional Agricultural Credit Corporation of Minneapolis, Minn.*, 278 N. W. 896. In this action, which will be referred to more fully hereinafter, a decision directly in conflict with that of the

Federal District Court and the Circuit Court of Appeals in this case has been filed.

There is pending in the District Court of Douglas County, Nebraska (a State court of general jurisdiction) in the action of *Smith et al.* v. *Peters,* a proceeding in garnishment in which the closely related question of whether the "Regional" is subject to such process is involved.

Other conflicts will undoubtedly develop and arise upon this question, an affirmative decision on which is a necessary prerequisite to action against the ten corporations each operating with paid-up capital of not less than $3,000,000 each in a different Land Bank district of the United States.

This capital of not less than $30,000,000 of the various "Regionals" has been used to make loans to farmers and stockmen on which interest is charged. The purpose of the loan is for raising, breeding, fattening or marketing of livestock. Other related activities such as operating a ranch, as set forth in petitioner's cause of action, have been indulged in by the "Regional". Under such a situation, litigation has and will result as a matter of common knowledge and experience where such far flung business activities are carried on. The question of whether the "Regionals" are subject to suit should therefore be determined by this Court in this case, the first opportunity so to do.

(B) Whether the Circuit Court decision is probably in conflict with applicable decisions of this Court.

The Circuit Court held the Regional was not subject to suit. The basis for this decision was that the court held that the "Regional" partakes of the sovereign's immunity from suit. As mentioned under the previous heading, this Court has not passed upon this question directly. However, this Court has repeatedly held similar government-

owned corporations, subject to suit and held that they did not partake of the sovereign's immunity from suit.

In one of the earlier line of decisions dealing with corporations organized pursuant to an act of Congress and whose capital stock was entirely furnished with Federal funds, this Court in the cases involving the United States Shipping Board Emergency Fleet Corporation repeatedly held such corporation subject to suit.

If the basis of these decisions is fully expressed in the following excerpts from those cases, the facts in this case are so closely parallel that the holding of the Circuit Court amounts to a direct conflict with the rule announced in those cases.

> "These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if any one would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of Government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts.
>
> "If what we have said is correct it cannot matter that the agent is a corporation rather than a single

man. The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law."

Sloan Shipyards Corp. et al. v. *U. S. Shipping Board Emergency Fleet Corp., etc.*, 258 U. S. 549, 42 Sup. Ct. Rep. 386, 66 Law Ed. 762.

"For in the present case the agent is not an individual and its liability does not involve any expenditure of private funds for the satisfaction of public obligations. Its entire capital stock is government owned. Its funds and property were furnished to it by the government. They and government indemnity are alone the sources from which its obligations will be defrayed.

"It was created as a government agency to construct a fleet of vessels to meet a wartime emergency. It was in order *better to fulfill that purpose that Congress chose an instrument having the power to contract, as well as all the other powers of a private corporation,* but with its every action government controlled and all its assets supplied from government sources." (Italics ours.)

U. S. Shipping Board, etc. v. *Harwood*, 281 U. S. 519, 50 Sup. Ct. Rep. 372, 74 L. Ed. 1011.

"Generally agents of a corporation are not agents of the stockholders and cannot contract for the latter. Apparently this was one reason why Congress authorized organization of the Fleet Corporation."

U. S. v. *Strang et al.*, 254 U. S. 491, 41 Sup. Ct. Rep. 165, 65 L. Ed. 369.

"We mention these details to show that the defendant although in form a private corporation *and liable to be sued as such,* was organized and owned by the United States as an agency for public service, was not engaged in ordinary merchandising, but under Mr. Hoover's directions was performing public functions arising out of the war and its sequels." (Italics ours.)

U. S. Grain Corp. v. *Phillips*, 261 U. S. 106, 43 Sup. Ct. Rep. 286, 67 L. Ed. 552.

"Being a private corporation, the Fleet Corporation may be sued in the state or federal courts like other private corporations; • • •

"Indeed, an important, if not the chief, reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the treasury under its established procedure of audit and control over the financial transactions of the United States." (Italics ours.)

United States v. *McCarl*, 275 U. S. 1, 48 Sup. Ct. Rep. 12, 72 L. Ed. 131.

In an early decision by Chief Justice Marshall the basis of these decisions was stated in regard to a State owned and operated bank as follows:

"It is, we think, a second principle, that when a *government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character*, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and *takes the character which belongs* to its associates, and to the *business which is to be transacted.* • • • *The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation.*" (Italics ours.)

Bank of U. S. v. *Planters' Bank of Ga.*, 9 Wheaton 904, 6 L. Ed. 244.

In an excellent opinion, Judge Lamar in an early case wrote the opinion of this Court holding that the Clemson Agricultural College although a State owned and maintained institution, was subject to suit for its *torts* and expressed the basis therefor as follows:

"Besides, neither a state nor an individual can confer upon an agent authority to commit a tort, so as to

excuse the perpetrator. In such cases the law of agency has no application, the wrongdoer is treated as a principal, and individually liable for the damages inflicted, and subject to injunction against the commission of acts causing irreparable injury.

"If the state had in so many words granted the college authority to take or damage the plaintiff's property for its corporate advantage without compensation, the Constitution would have substituted liability for the attempted exemption. But the state of South Carolina passed no such act, and attempted to grant no such immunity from suit as is claimed by the college. On the contrary, the statute created an entity, a corporation, a justic person, whose right to hold and use property was coupled with the provision that it might sue and be sued, plead and be impleaded, in its corporate name.

"For protecting the bottom land, the college, *for its own corporate purposes and advantages,* constructed the dyke. In so doing it was not acting in any governmental capacity. *The embankment was in law similar to one which might have been built for private purposes by the plaintiff* on the other side of the river. If he had there constructed a dyke to protect his farm, and in so doing had taken or damaged the land of the college, he could have been sued and held liable. In the same way, and on similar principles of justice and legal liability, the college is responsible to him if, for its own benefit, and for protecting land which it held and used, it built a dyke which resulted in taking or damaging the plaintiff's farm. 2 Dill. Mun. Corp. 4th ed. #966, p. 1180." (Italics ours.)

Hopkins v. *Clemson Agricultural College,* 221 U. S. 636, 31 Sup. Ct. Rep. 654.

And this Court has held the government owned United States Spruce Corporation subject to suit.

Olson v. *U. S. Spruce Corp.,* 267 U. S. 462, 45 Sup. Ct. Rep. 357, 69 L. Ed. 738.

Various other Federal Corporations have been held subject to suit and not immune from suit on the basis of partaking of the sovereign immunity from suit. Many decisions involving these questions in regard to particular governmental owned corporations have not reached this Court.

In addition to being in probable conflict with the applicable authorities of this Court above cited, the decision of the Federal District Court and the Circuit Court of Appeals in this action are in direct conflict with the decision of the Minnesota State Supreme Court as shown from the following excerpts from the opinions of that court.

> "Defendant cites and relies on Keifer & Keifer *v.* Reconstruction Finance Corporation et al., 22 F. Supp. 918, decided August 5, 1937, by the United States District Court, District of Nebraska, holding that a regional agricultural credit corporation may not be sued without the consent of Congress and that Congress has not given such consent. With utmost deference to the court which decided that case, we refuse to follow it because we think congressional consent to suit has been given."
>
> *Casper* v. *Regional Agr. Credit Corp.*, 278 N. W. 896 (Minn.).

In stating the question the court in the cited case calls attention to the fact that the question must be decided by each court as it appears to that court at that time in view of the fact that no general rule has been laid down by this Court.

> "Whether federal agencies are subject to suit and to what extent is a question of congressional intent. Federal Land Bank *v.* Priddy, 295 U. S. 299, 55 S. Ct. 705, 706, 79 L. Ed. 1408. The general rule is that the sovereign immunity of the United States does not extend to its agents, individual or corporate. Sloan Shipyards Corp. *v.* U. S. Fleet Corp., 258 U. S. 549, 42 S. Ct. 386, 388, 66 L. Ed. 762; United States *v.* Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171; Belknap *v.* Schild,

161 U. S. 10, 16 S. Ct. 443, 40 L. Ed. 599; 26 R. C. L. 1459 #63, note 15; note, 15 Ann. Cas. 1109. No rule has been laid down by the Supreme Court of the United States by which the congressional intent may be determined in a particular case."

Casper v. *Regional Agr. Credit Corp.*, 278 N. W. 896 (Minn.).

After a very exhaustive review of the decisions of this Court and other Federal courts in regard to government created corporations which claim immunity from suit, the Minnesota Supreme Court gave the reasons for its decision as follows:

"The inference that defendant is subject to suit is supported by the fact that its creator, the Reconstruction Finance Corporation, is itself subject to suit.

"The rule of nonimmunity has been applied without respect to the law under which the corporation was organized.

Casper v. *Regional Agr. Credit Corp.*, 278 N. W. 896 (Minn.).

The decision of the Minnesota Supreme Court is stated succinctly in Syllabus 2:

"Regional agricultural credit corporations are not immune from suit. Reconstruction Finance Corporation Act #201 (e), 15 U. S. C. A. #605b(e)."

Your petitioners respectfully submit that the final determination by this Court of the questions of law involved in this case are of the utmost importance to the right of all parties dealing with the Regional Agricultural Credit Corporations which are organized and existing throughout the United States.

The decision of the Circuit Court of Appeals herein is not only contrary to law as announced by this Court in its earlier decisions, but is contrary to the sound principles that the immunity of the sovereign from suit should not be

extended except upon clearly expressed congressional authority.

Unless the errors in the decision of the Circuit Court be corrected by this Court, the effect will be to create regrettable confusion regarding questions of law which are of the utmost importance to all farmers and stockmen and other persons who have had dealings or contracts with any of the various Regional Agricultural Credit Corporations.

2. Whether the "RFC" is subject to suit as principal for the "Regional's" tortious acts.

The "RFC" is a corporation expressly made subject to suit by the act creating it. The "RFC" was authorized to create the "Regional" as a corporation. The "RFC" did not have the "Regional" created under the laws of one of the States but issued a charter direct to the Regional (R. 11, 12). Under the charter the "Regional" was to be "managed by officers and agents appointed by the 'RFC', under such rules and regulations as the Board of Directors of the 'RFC' may prescribe. * * *"

The "Regional" as a corporation still operates under that charter. The "RFC" furnished the capital and still retains the above duties by virtue of the "Regional's" charter. The President's proclamation, referred to in the Circuit Court of Appeals opinion and in this brief, does not amend this charter. This presents the question as to whether or not the "Regional" is an agent of the "RFC" under a long line of cases recognizing the agency of the controlled corporation under such a situation. We urge that the "RFC" is subject to suit as the principal, for the tortious acts of its agent, the "Regional". To this effect see:

U. S. v. *United Shoe Machinery Co.*, 234 Fed. 127;

Fourth Nat'l Bank of Montgomery v. *Portsmouth Cotton Oil Refining Corp.*, 5th C. C. A., 284 Fed. 718, affirming 280 Fed. 879;

Centmont Corp. v. *Marsch* (C. C. A. Mass.), 68 F. (2d) 460;

In re Kentucky Wagon Mfg. Co., 71 F. (2d) 802;

McCaskill v. *U. S.*, 216 U. S. 504, 30 Sup. Ct. Rep. 386, 54 L. Ed. 590.

3. Whether the District Court erred.

The order of the District Court sustaining the demurrer of respondent's and dismissing petitioner's cause of action, as well as the refusal to allow petitioner to amend its petition, was assigned as error on appeal to the District Court. If petitioner's contentions herein are correct, this Court should upon taking jurisdicton of this action reverse this order of the District Court as well as the decision and order of the Circuit Court.

V. Conclusion.

These are questions which this petitioner suggests should be definitely settled by this Court. For these reasons it is respectfully submitted that this petition for writ of certiorari to review the decree and order of the United States Circuit Court of Appeals for the Eighth Circuit should be granted.

KEIFER AND KEIFER, ETC.,
Petitioners,

By E. B. PERRY,
ROBERT VAN PELT,
LLOYD J. MARTI,
ARTHUR E. PERRY,
JOSEPH P. O'GARA,
Attorneys.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 364

KEIFER AND KEIFER, a co-partnership, composed of J. Warren Keifer, Jr., and Oswin Keifer,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation, and REGIONAL AGRICULTURAL CREDIT CORPORATION OF SIOUX CITY, IOWA, a corporation,

Respondents

BRIEF OF PETITIONER

E. B. PERRY,
ROBERT VAN PELT,
LLOYD J. MARTI,
ARTHUR E. PERRY,
JOSEPH P. O'GARA,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 364

KEIFER AND KEIFER, a co-partnership, composed of J. Warren Keifer, Jr., and Oswin Keifer,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation, and REGIONAL AGRICULTURAL CREDIT CORPORATION OF SIOUX CITY, IOWA, a corporation,

Respondents

BRIEF OF PETITIONER

To the Honorable, The Supreme Court of the United States:

A writ of certiorari was granted for review of the decree of the United States Circuit Court of Appeals for the Eighth Circuit affirming a decree of the United States District Court for the District of Nebraska, Omaha Division. The District Court opinion (R. 35) is reported as *Keifer & Keifer* v. *R. F. C. and Regional Agricultural Credit Corp.*, 22 Fed. Sup. 918. The United States Circuit Court of Appeals opinion (R. 45-51) is reported as *Keifer & Keifer* v. *Reconstruction Finance Corp., et al*, 97 Fed. (2d) 812.

The sole question to be presented to this court under the ruling of this court on the petition for writ of certiorari is whether the "Regional", a corporation created by the "RFC" pursuant to an act of Congress with its capital of $3,000,000.00 subscribed and paid by the "RFC", whose officers and agents were appointed by the "RFC" until this function was transferred to the Farm Credit Administration by executive order No. 6084, dated March 27, 1933, and which "Regional" is authorized by said congressional act, 15 U. S. C. A. 605B (e) to have capital (not capital stock), corporate organization, and power to make loans and advances for agricultural and livestock purposes, charge interest thereon, and to rediscount its paper and which Act of Congress did not, in express terms, declare that the "Regional" might sue or be sued and which "Regional" was engaged at the time of the tortious act complained of in wintering livestock upon which the "Regional" had a chattel mortgage, upon a ranch operated by it, is subject to suit for a tort committed by it.

STATEMENT OF THE CASE

This is an action at law brought in the District Court of the United States for the District of Nebraska, Omaha Division, by the petitioner herein against the respondents. The petition sets forth in separate counts five causes of action. Of these five causes of action, four are brought by the petitioner as assignee while the other is brought by the petitioner in its own right. For the sake of brevity the petitioner and the petitioner's four assignors will be referred to herein as "petitioner" and the Reconstruction Finance Corporation, a corporation, will be designated and referred to herein as "RFC" and the Regional Agricultural Credit

Corporation of Sioux City, Iowa, will be designated and referred to herein as the "Regional".

In all of the five causes of action it is alleged that "petitioner" delivered to the "Regional" certain cattle which the "Regional", as mortgagee, was to keep during the winter of 1934-35 and care for in such a manner as to enhance the value and condition of said cattle. The "Regional" negligently failed to keep, shelter, feed, water and care for said cattle, resulting in damage to the "petitioner" (R. 1-13 and 25-32). The specific acts of negligence and the items of damage to "petitioner" therefrom are set forth in the petition. The respondents interposed separate demurrers to this complaint (R. 32-33) which set up substantially the following grounds: (1) That the court had no jurisdiction of the respondents or the subject matter, because the respondents were immune from suit without the permission of Congress, and (2) that the petition did not state facts sufficient to constitute a cause of action against respondents or either of them.

The "Regional" was created by the "RFC" pursuant to Section 605B(e) of the Act under which the "RFC" was organized (15 U. S. C. A., Secs. 601-617, C. 520, §201 (e) 47 Stat. 713). This Act authorized the "RFC" to "create" a Regional Agricultural Credit Corporation in each of the twelve Federal Land Bank districts, with a paid up capital of not less than $3,000,000.00 to be subscribed by the "RFC" and paid out of the unexpended balance of the amount allocated and made available to the Secretary of Agriculture. The Act provided that the officers and agents should be appointed by the "RFC". This function was later transferred to the Governor of the Farm Credit Administration, pursuant to executive order

No. 6084, dated March 27, 1933, effective on May 27, 1933. The same order transferred to the Governor of the Farm Credit Administration control of the funds allocated by the Act to the Secretary of Agriculture.

The Act in express terms declared that the "RFC" should have capital stock, corporate organization, sue and be sued, a limited duration, and numerous powers and purposes (15 U. S. C. A., Sec. 604, C. 8, §4, 47 Stat. 6). It provided that a Regional Agricultural Credit Corporation shall have capital (not capital stock), corporate organization and power to make loans and advances for agricultural and livestock purposes, charge interest thereon and to rediscount its paper. The Act does not in express terms declare the "Regional" may sue or be sued, nor does it limit its duration.

The District Court sustained the demurrers, expressing the view that the defendants were instrumentalities of the United States and hence were immune from suit in an action sounding in tort, without the permission of Congress (R. 34). The District Court thereupon dismissed the action (R. 35).

On appeal to the United States Circuit Court of Appeals for the Eighth Circuit, that court on July 7, 1938, entered an opinion and judgment in which it held that the petition stated facts sufficient to constitute a cause of action under the Nebraska law against the defendant "Regional" but held that the transfer of the control of the "Regional" by executive order relieved the "RFC" of any liability and that the respondent "Regional" was a governmental agency with immunity from suit and affirmed the dismissal by the District Court (R. 45-51).

STATEMENT OF POINTS TO BE ARGUED

Congressional intent that the "Regional" be subject to suit is expressed by selection of a corporation itself subject to suit (the R. F. C.) to form the "Regional".

Title 15, Section 604, U. S. C. A. Sup.; C. 8, §4, 47 Stat. 6

Title 15, Section 605B (e) U. S. C. A. Sup.; C. 520, § 201 (e), 47 Stat. 713

Casper v. *Regional Agl. Credit Corp.*, 202 Minn. —, 278 N. W. 896

Congressional intent that the "Regional" be subject to suit is expressed by direction that the "Regional" be formed as a corporation.

Casper v. *Regional Agl. Credit Corp.* (Minn.) 278 N. W. 896

Bank of U. S. v. *The Planters Bank of Georgia*, 9 Wheat. (U. S.) 904, 6 L. Ed. 244

Fed. Sugar Refin. Co. v. *U. S. Sugar Eq. Bd.* 268 Fed. 575

Sloan Shipyards Corp. v. *U. S. Shipping Bd.*, 258 U. S. 549, 42 S. Ct. R. 386, 66 L. Ed. 762

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No. Dak.-Montana Wheat Growers' Ass'n. v. *U. S.*, 66 Fed. (2d) 573, 92 A. L. R. 1484 (8th C. C. A.)

Phillips v. *U. S. Grain Corp.*, 279 Fed. 244

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Olson v. *U. S. Spruce Corp.*, 276 U. S. 462, 45 S. Ct. R. 357, 69 L. Ed. 738

United States v. *Deutsches Kalisyndikat Gesellschaft*, 31 F. (2d) 199

Becker Steel Co. v. *Cummings*, 296 U. S. 74, 56 S. Ct. R. 15, 80 L. Ed. 54

Congressional intent that the "Regional" be subject to suit is expressed by nature of business "Regional" was directed to transact.

Title 15, Sec. 605B (e) U. S. C. A. Sup.; C. 520, § 201 (e), 47 Stat. 713

Bank of U. S. v. *Planters Bank of Georgia*, 9 Wheat. (U. S.) 904, 6 L. Ed. 244

U. S. Shipping Bd. Em. Fleet Corp. v. *Harwood*, 281 U. S. 519, 50 S. Ct. R. 372, 74 L. Ed. 1011

Standard Oil Co. v. *U. S.*, 25 Fed. (2d) 480

Hopkins v. *Clemson Agl. College*, 221 U. S. 636, 31 S. Ct. R. 654, 55 L. Ed. 890

Central Market Inc. v. *King*, 132 Neb. 380, 272 N. W. 244 (cert. refused), 302 U. S. 687, 58 S. Ct. 17, 82 L. Ed. 14

Federal Land Bank v. *Priddy*, 295 U. S. 229, 55 S. Ct. R. 705, 79 L. Ed. 1408

St. of No. Dak. v. *Olson*, 33 Fed. (2d) 848, (8th C. C. A.)

Gross v. *Kentucky Bd. of Mgrs.*, 49 S. W. 458, 105 Ky. 840

Congressional intent that the "Regional" be subject to suit is expressed by inclusion of the word "Corporation" in the name of the respondent "Regional".

3 Thompson on Corporations, 821 (3rd Ed.)

13 American Jurisprudence, 1072, Corporations, Sec. 1155

Dartmouth College v. Woodward, 4 L. Ed. 629, 4 Wheat. (U. S.) 518

Martin v. *Kentucky Lands Inv. Co.*, 142 S. W. 1038 (Ky.)

Barrow S. S. Co. v. *Kane*, 170 U. S. 100, 18 S. Ct. R. 526, 42 L. Ed. 964

14 Corpus Juris, 235, Corporations, Sec. 253

14 Corpus Juris, 235, Corporations, Sec. 254

14 Corpus Juris, 236, Corporations, Sec. 255

Tulare Irrig. Dist. v. *Shepard*, 185 U. S. 1, 22 S. Ct. R. 531, 46 L. Ed. 773

Section 24-221, 1929 Comp. Stat. of Nebr.

Gilligan v. *John Gilligan Co.*, 94 Neb. 437, 143 N. W. 457

Immunity of the sovereign from suit does not extend to agents, no agent being an agent for the purpose of committing a tort.

Hopkins v. *Clemson Agl. College*, 221 U. S. 636, 31 S. Ct. R. 654, 55 L. Ed. 890

Sloan Shipyards Corp. v. *U. S. Shipping Bd.*, 258 U. S. 549, 42 S. Ct. R. 386, 66 L. Ed. 762

McComb v. *U. S. Housing Corp.*, 264 Fed. 589

ASSIGNMENT OF ERRORS

Petitioner's assignment of errors is set forth on page 36 of the transcript of the record. The particular assignments of error to be urged in this brief are:

The court erred in sustaining the demurrer of the respondent "Regional" to petitioner's petition.

The court erred in entering a final judgment of dismissal in favor of the respondents.

This action should be reversed with leave to the petitioner to amend, and for trial on the merits.

ARGUMENT

I. Congressional intent that the "Regional" be subject to suit is expressed by selection of a corporation itself subject to suit (the R. F. C.) to form the "Regional".

The Reconstruction Finance Corporation was expressly authorized to sue and be sued by Congress at the time of its organization.

> "The corporation shall have succession for a period of ten years from the date of the enactment hereof unless it is sooner dissolved by an act of Congress. It shall have power to adopt, alter, and use a corporate seal, which shall be judicially noticed; to make contracts, to lease such real estate as may be necessary for the transaction of its business; *to sue and be sued*, to complain and to defend, in any court of competent jurisdiction, state or federal."
>
> Title 15, Section 604, pp. 98, 99, U. S. C. A. Sup., C. 8, §4, 47 Stat. 6.

The F. R. C. was authorized to form the "Regional".

> "The Reconstruction Finance Corporation is further authorized to create in any of the twelve Federal Land Bank districts where it may deem the same to be desirable a Regional Agricultural Credit Corporation with a paid up capital of not less than $3,000,000 to be subscribed by the Reconstruction Finance Corporation and paid for out of the unexpended balance of the amount allocated and made available to the Secretary of Agriculture under Section 602 of this Title. Such corporations shall be managed by officers and agents to be appointed by the Reconstruction Finance Corporation under such rules and regulations as its Board of Directors may prescribe. Such corporations are hereby authorized and empowered to make loans or advances to farmers and stockmen, the proceeds of which are to be used for an agricultural purpose (including crop production), or for the raising, breeding, packing, or marketing of livestock, charge such rates of interest or discount thereon as in their judgment are fair and equitable, * * *."
>
> Title 15, Section 605B (e) U. S. C. A. Sup. 107, 108, C. 520, §201 (e), 47 Stat. 713.

The Minnesota Supreme Court took this view in the case decided by it:

> "The inference that defendant is subject to suit is supported by the fact that its creator, the Reconstruction Finance Corporation, is itself subject to suit. The theory on which immunity is sustained is that the creator has transmtited to the creature its sovereign immunity. The government withheld such immunity from the Reconstruction Finance Corporation. It thus indicated a general policy of subjecting the Reconstruction Finance Corporation and its property to suit and judicial process. True, defendant derives its powers

> from the statute, but it is hardly to be inferred that immunity would be granted to the creature where it is withheld from the creator. The fact that defendant was created a corporation with all incidents of a corporation would seem to be decisive in the light of other considerations."
>
> *Casper* v. *Regional Agl. Credit Corp.*, 202 Minn. —, 278 N. W. 896.

Congress caused the R.F.C. to create the "Regional". Congress having determined the paternity of the "Regional", will be presumed to have intended that the blood of the father appear in the child. The life blood of the R.F.C. is that of a corporation subject to suit.

Congress expressed itself by saying that a corporation should be organized by a corporation already organized and subject to suit. Congress did not say the corporation so created was to be immune from suit. Thus the "Regional", being a corporation and conceded by its attorneys to be a separate entity has, by necessary, reasonable and fair inference, congressional authority to sue and be sued. The "Regional" has exercised a right to sue by bringing actions in many instances against persons to whom it has made loans. The "Regional" could bring suits without express authority for the same reason it is subject to suit. Such powers are implied from its corporate capacity.

The Congress had no necessity to say the "Regional" was to be subject to suit. Congress had in the past authorized administrative officers and boards to set up corporate agencies and in every instance such agencies had been held subject to suit. Thus the U. S. Shipping Board, an unin-

corporated agency, itself immune from suit, was authorized to create the U. S. Shipping Board Emergency Fleet Corporation, and the corporation was held subject to suit; the U. S. Food Administrator (not subject to suit) created the U. S. Grain Corporation and the corporation was held subject to suit; the same agency organized the Sugar Equalization Board, Inc., and the corporation was held subject to suit; the Isthmian Canal Commission (not subject to suit) created the Panama Railroad Company and the latter was held subject to suit as a corporation; the Farm Board (not subject to suit) created various marketing corporations which were held subject to suit; the Director of Air Craft Production (not subject to suit) organized the U. S. Spruce Corporation and it was held subject to suit.

Congress is presumed to know the law. The law had held corporations formed, owned, operated and directed by unincorporated and immune government agencies subject to suit even though Congress had not expressly waived the corporation's immunity from suit. When Congress then directed the R.F.C., itself subject to suit, to form a corporation, it must have intended to thereby express, by directing its formation as a corporation and directing that it loan money at interest, that such corporation be subject to suit.

The place of incorporation is not a test of the intent of Congress because on this point Congress is silent. The issuance of a charter by the R.F.C. without complying with the incorporation laws of a state or the District of Columbia was an oversight, or a brain-child of the R.F.C., not an expression from Congress. That the mind of the person who formed the "Regional" did not cperate as the persons

who formed the U. S. Sugar Equalization Board, Inc., the Panama Railway, the marketing or stabilization corporations or the U. S. Spruce Corporation did not reflect any congressional intent and is not a sound basis for distinction.

Congress has clearly indicated its intention that the "Regional" be subject to suit by directing it be a corporation, directing the R.F.C. to create it, directing that it engage in business, and giving it the name of a corporation.

II. Congressional intent that the "Regional" be subject to suit is expressed by direction that the "Regional" be formed as a corporation.

The decision of the Supreme Court of Minnesota in a case involving the Regional operating in that state is especially pertinent on this phase:

> "A grant of corporate existence is itself a grant of power to sue and be sued. Those incidents, unless expressly withheld, exist without specific enumeration. 3 Thompson, Corporations, 3d Ed., Sec. 2180, p. 821; 1 Cook, Corporations, 8th Ed. Sec. 3, p. 16; 2 Kent's Commentaries, 13th Ed., 369; 1 Chitty's Blackstone 395, where it is stated that the incidents of a corporation, including the power to sue and be sued, implead and be impleaded, 'are necessarily and inseparably incident to every corporation * * * as soon as a corporation is duly erected * * *'; 6 Viner's Abr. 265 (G), 'When a corporation is duly created, all other incidents are tacitly annexed. As if the king makes a general corporation * * * without any words of license * * * yet the corporation may purchase, plead, or be impleaded well enough; for that by the making of the corporation all those necessary incidents are included'; 8

Halsbury's Laws of England 67, 68; 7 R. C. L. 689, Sec. 690; *Hancock* v. *Louisville Railroad Co.*, 145 U. S. 409, 12 S. Ct. 969, 36 L. Ed. 755; *McLoud* v. *Selby*, 10 Conn. 389, 27 Am. Dec. 689; *De Haas* v. *Pennsylvania R. Co.*, 261 Pa. 499, 104 A. 733; *The Case of Sutton's Hospital*, 5 Coke, Part X, p. 285. This was the settled rule prior to the decision in the case of *Sutton's Hospital* in 1612, supra, in which the court said that the power to sue and be sued is one of the incidents of a corporation and that when a corporation is duly created, the 'incidents are tacitly annexed' including the power to sue and be sued, implead, and be impleaded. The expression used in *Sutton's Case*, that a corporation may sue and be sued, implead, and be impleaded, is still the language of the books. The power of defendant to sue and be sued is implied from the very fact that it is a corporation, the same as though the power had been expressly stated and granted. Such power is a part of defendant's very corporate existence."

Casper v. *R. A. C. C.*, 202 Minn. —, 278 N. W. 896.

The incorporation of an agent has always been conclusive that it was subject to suit when immunity of such an agent was claimed.

"Thus many states of the Union who have an interest in banks, are not suable even in their own courts; yet they never exempt the corporation from being sued. * * * As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act.

"The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a

party to suits brought by or against the bank in the sense of the constitution. So with respect to the present bank. Suits brought by or against it are not understood to be brought by or against the United States. *The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation,* and exercises no power or privilege which is not derived from the charter.

"We think, then, that the Planters' Bank of Georgia is not exempted from being sued in the federal courts, by the circumstance that the state is a corporator." (Italics ours).

The Bank of the U. S. v. *The Planters' Bank of Georgia,* 9 Wheat. 904, 6 L. Ed. 244.

The District Court of New York, after quoting the Planters' Bank case, supra, went on to say as to the United States Sugar Equalization Board, Inc.:

"Here the case, if anything, is not so strong. The United States is not an incorporator, but a stockholder in a corporation, which, as a *condition or necessary accompaniment of its existence, can be sued and can engage in business.* In enacting the statutes, supra, Congress intended, inter alia, to conserve necessaries during the war, and therefore, conferring large and almost unlimited powers to select agencies to that end, it is fair to assume that the Congress realized that it might be necessary to engage in commercial transactions. The very incorporation of defendant demonstrates that the ordinary methods of transacting business by executive departments were inadequate, and doubtless subject to embarrassment by a maze of unworkable statutes and regulations, and that the elastic powers of a business corporation would enable the purchase and sale of sugar to be engaged in with the same facility as such transactions ordinarily go forward at the hands of individuals or business corpora-

tions. Such an incorporation was undoubtedly a practical and helpful instrumentality for doing the work with which the government was confronted; but it is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and be able to contract with others, or to injure others, confident that no redress may be had against it as matter of right, but only, if at all, as matter of the favor of the sovereign.

"There is not even in this case the creation of a corporation by act of Congress nor an express direction to incorporate, such as is found in the Shipping Act (Comp. St. Secs. 8146a-8146r). Gould Coupler Co. Case, supra. But here the Executive, in pursuance of the discretion vested in him, *chose an agent which by its very nature and existence* had the right to engage in a commercial business. *The whole tendency is against the extension of the immunity of the sovereign* as against proper suitors, as is evidenced by such legislation as the Tucker Act (24 Stat. 505) and the Shipping Act (construed in certain respects in The Lake Monroe, 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. 962), and by cases such as are cited supra. This is not a case which invites a step in the opposite direction." (Italics ours).

Federal Sugar Refin. Co. v. United States S. E. Board, 268 F. 575, 586.

And the same reason was assigned for holding the United States Shipping Board Emergency Fleet Corporation subject to suit.

"The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, what-

ever indemnities might be furnished by the United States."

Sloan Shipyards Corp. v. *United States Shipping Board*, 258 U. S. 549, 42 S. Ct. R. 386, 66 L. Ed. 762.

Chief Justice Taft in dissenting from the majority opinion which held the United States Shipping Board Emergency Fleet Corporation subject to suit, used strong language as to the effect of an incorporation.

"I concede that the legislation originally creating this corporation, without express immunity from suit, naturally gives rise to the inference that Congress concluded that the greater freedom of action secured by carrying on business in corporate form was desirable and that in the absence of express provision for it, and in respect to what the corporation was originally intended to do, immunity cannot be reasonably implied from the relation of the government to the corporation and its interest in its business." (Italics ours).

Sloan Shipyards Corp. v. *United States Shipping Board*, supra.

"The meaning of incorporation is that the corporate entity is a person and as such is subject to the general rules of law. While the United States owns all the stock of the defendant corporation, it is controlled and managed by its own officers, who are responsible directly to it, and must be regarded as a separate entity, which may enter into contracts and sue and be sued." (Italics ours).

United States Shipping Board Emergency Fleet Corp. v. *Tabas*, 22 F. (2d) 398 (3d C. C. A.).

"The Shipping Board, in the present case, in answer to plaintiff's petition, by way of defense, set up

the authority vested in it by the President, and alleged that it was acting solely as the agent of the United States, and not on its own behalf as a private corporation. To this the plaintiff demurred, and moved to strike out this defense on the ground that it is immaterial, irrelevant, and constitutes no defense to the present action. The motion was properly sustained, since the action here is against the Shipping Board, *acting in the capacity of a private corporation.* In this it differs from the Russell Motor Case, where the action was clearly one against the United States, since the contract was made by the Secretary of the Navy, *acting, not in a corporate capacity,* but on behalf of the government, the only way in which he could act. *This,* in brief, we think, *is the distinguishing feature* which obviates the necessity of plaintiff invoking the jurisdiction of the Court of Claims." (Italics ours).

United States Shipping Board Emergency Fleet Corp. v. *Eichberg,* 14 F. (2d) 248 (District of Columbia C. C. A.).

An examination of some of the other corporations formed by Congress for the purpose of carrying on different commercial enterprises for the government, and the fact that they have consistently been held to be liable to suit, afford authority for a decision to like effect in this action.

"*Being a private corporation, the Fleet Corporation may be sued in the state or federal courts like other private corporations;* it does not enjoy the priority of the United States in bankruptcy proceedings (*Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation,* 258 U. S. 549, 42 S. Ct. R. 386, 66 L. Ed. 762), and its employees are not agents of the United States, subject to the provisions of section 41 of the Criminal Code, being 18 U. S. C. A.

Sec. 93 (*United States* v. *Strang*, 254 U. S. 491, 41 S. Ct. R. 165, 65 L. Ed. 369). Compare 34 Op. Attys. Gen. 241.

"Government-owned private corporations were employed by the United States as its instrumentalities in several other fields during the World War. The Food Administration Grain Corporation (later called the United States Grain Corporation) was organized under the laws of Delaware under Food Control Act Aug. 10, 1917, c. 53, Sec. 19, 40 Stat. 276 (Comp. St. Sec. 3115 1/8n). See Act March 4, 1919, c. 125, 40 Stat. 1348, and Executive Orders of August 14, 1917, and March 4, 1919. The United States Spruce Corporation was organized by the Director of Air Craft Production under the laws of the District of Columbia, pursuant to Act July 9, 1918, c. 143, 40 Stat. 845, 888, 889 (Comp. St. Secs. 3115 1/32 g-3115 1/32k), for the purpose of aiding in the production of aircraft material. The United States Housing Corporation was organized under the laws of the District of Columbia by authority of the President, for the purpose of providing housing for war needs under Act June 4, 1918, c. 92, 40 Stat. 594, 595 (3115 5/6g, 3115 5/6gg, 3115 5/6i). The War Finance Corporation was organized under Act April 5, 1918, c. 45, 40 Stat. 506 (15 USCA Sec. 331 et seq. (Comp. St. Secs. 3115 4/5a—3115 4/5qq)), to assist financially industries important to the successful prosecution of the War. For many years before the War, the government had employed the Panama Railroad Company as its instrumentality in connection with the Canal. And, since the War, the Inland Waterways Corporation has been organized by the Secretary of War to operate the government-owned inland waterways system pursuant to Act June 3, 1924, c. 243, 43 Stat. 360 (49 USCA Secs. 151-156 (Comp. St. Secs. 10071½ -10071½e)). The government likewise has established, and holds all the stock in, the Federal Inter-

mediate Credit Banks, formed under Act March 4, 1923, c. 252, title 1, Sec. 205, 42 Stat. 1454, 1457 (12 USCA Sec. 1061), to bring about easier agricultural credits." (Italics ours).

United States v. *McCarl*, 275 U. S. 1, 48 S. Ct. R. 12, 71 L. Ed. 131.

In deciding the case of *North Dakota-Montana Wheat Growers Assn.* v. *U. S.*, 66 Fed. (2d) 573, 92 A. L. R. 1484, the Eighth Circuit Court of Appeals held that an action brought against the Farm Board was analogous to bringing one against the United States Shipping Board, both of which are unincorporated agencies and that the plaintiff erred in not bringing the action against the corporation organized by the Farm Board which would be analogous to the Shipping Board Emergency Fleet Corporation, or to the Regional Agricultural Credit Corporation in this action as distinguished from the Farm Credit Administration or R.F.C. The court in ruling on this matter said:

"It evidently had recognized the stabilization corporations which dealt with defendant in relation to the wheat. These corporations acting as marketing agencies for their stockholders or members and for the purpose of controlling any surplus in a commodity in furtherance of the general policy of the Agricultural Marketing Act. *They were distinct entities, duly incorporated, and undoubtedly entitled to sue and to be sued as other corporations.* It is entirely different, we think, as to the Farm Board. It has no identity separate and distinct from the government—it is merely an unincorporated agency of the government to carry out the purposes of the Agricultural Marketing Act. The government has created at various times corporations for certain purposes and to act as instrumentalities in furtherance of governmental purposes,

and provided as to some of them that they may sue and be sued. Such provisions exist as to Federal Reserve Banks, section 341, chapter 3, title 12 USCA; Federal Land Bank, section 676, chapter 7, title 12 USCA; Federal Intermediate Credit Banks, section 1023, chapter 8, title 12 USCA; Reconstruction Finance Corporation, section 604, chapter 14, title 15 USCA." (Italics ours).

The United States Food Administrator (an unincorporated governmental agency not subject to suit) created the United States Grain Corporation. The distinction as to immunity of the organizing agency and the corporation was examined and the corporation held subject to suit.

Phillips v. *U. S. Grain Corp.*, 279 Fed. 244; *U. S. Grain Corp.* v. *Phillips*, 261 U. S. 106, 43 S. Ct. R. 283, 67 L. Ed. 552.

The United States Food Administrator also formed the United States Sugar Equalization Board, Incorporated. The distinction between a governmental board and a corporation was recognized and the corporation held subject to suit.

Federal Sugar Refining Co. v. *U. S. Sugar Equalization Board, Inc.*, 268 Fed. 575.

The Isthmian Canal Commission (an unincorporated governmental agency, not subject to suit) operated through the Panama Railroad Company, a corporation. The distinction has been repeatedly recognized and the corporation held subject to suit.

Salas v. *United States*, 234 Fed. 842 (C.C.A. 2); *Panama R. Co.* v. *Curran*, 256 Fed. 768; *Panama R. Co.* v. *Minnix*, 282 Fed. 47.

The Farm Board (an unincorporated governmental agency, held not subject to suit) formed various marketing corporations and the 8th Circuit Court held those marketing corporations "were distinct entities, duly incorporated, and undoubtedly entitled to sue and be sued as other corporations."

> *North Dakota-Montana Wheat Growers Assn.* v. *United States*, 66 Fed. (2d) 573, 92 A.L.R. 1484.

Similar distinctions have been recognized as to the Director of Air Craft Production organizing the United States Spruce Corporation, and the Secretary of War organizing the Inland Waterway Corporation.

> See *Olson* v. *U. S. Spruce Corp.*, 276 U. S. 462, 45 S. Ct. R. 357, 69 L. Ed. 738.

In the seven examples just mentioned, the corporations were formed, created and used by an administrative agency without any congressional expression as to whether such corporations should be subject to, or immune from suits. In each instance the corporation was held subject to suit because of its incorporation and despite the immunity from suit of the body or person organizing such corporations.

In the case of the Regionals there is a similar congressional silence as to the corporations being subject to, or immune from, suit. But Congress required that a corporation be formed and further directed creation of the corporation by the R.F.C., itself an incorporated body and subject to suit.

The distinction existing between these seven corporations and the Regional, so far as any congressional expres-

sion as to suability is concerned, conclusively shows a stronger case as to the Regional being subject to suit than any of the other seven corporations. Yet the Circuit Court of Appeals held that Congress intended all seven of these corporations to be subject to suit and the Regional corporation exempt from suit. We respectfully submit that the opinion of the Minnesota Supreme Court is correct and that the decision of the Circuit Court of Appeals is based upon a distinction which is actually nonexistent.

The rule hereinbefore set forth in regard to the suability of corporations organized by our government has been applied to corporations organized by foreign governments.

> "The person and property of a foreign sovereign and those who represent him are inviolable, whether their acts are commercial, tortious, or criminal, and no matter where performed, but no one else enjoys such immunity (Syl. 1).
>
> "A suit against a corporation is not a suit against a government merely because it has been incorporated by direction of the government and is sued as a governmental agent and its stock is owned solely by government" (Syl. 2).
>
> *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F. (2d) 199.

The plaintiff in this action being a citizen of the United States, is equally entitled to the protection of the Fifth Amendment as was the alien whose rights were involved in the cited case.

> *"Only compelling language in congressional enactments will be construed as withdrawing or cur-*

tailing the privilege of suit against the United States Government in recognition of obligation imposed by constitution." (Italics ours).

Becker Steel Co. v. *Cummings*, 296 U. S. 74, 56 S. Ct. R. 15, 80 L. Ed. 54.

III. Congressional intent that the "Regional" be subject to suit is expressed by nature of business "Regional" was directed to transact.

The Congressional enactment authorizing creation of the Regional provided that it was "authorized and empowered to make loans or advances to farmers and stockmen, the proceeds of which are to be used for an agricultural purpose (including crop production), or for the raising, breeding, packing, or marketing of livestock, charge such rates of interest or discount thereon as in their judgment are fair and equitable." (See Title 15, Section 605B, (e) U.S.C.A. Sup., C. 520, §201 (e), 47 Stat. 713.

The "Regional", respondent herein, is, by its charter "hereby authorized and empowered to do and perform all acts and transact all business which by implication or otherwise is permitted legally to be done, performed and transacted * * * and to do all other things incidental thereto and necessary or appropriate in connection therewith * * *" (P. 11, Record).

"It is, we think, a sound principle, that when a *government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character,* and takes that of a private citizen. Instead of com-

municating to the company its privilege and its prerogatives, it descends to a level with those with whom it associates itself, and *takes the character which belongs to its associates*, and *to the business which is to be transacted.* (Italics ours).

The Bank of the U. S. v. *The Planters' Bank of Georgia*, 9 *Wheat.* (U. S.) 904, 6 L. Ed. 244.

We have previously emphasized, and again repeat our belief, that the instant case is similar in principle to the Shipping Board cases.

"The only question now presented is whether the quasi-public character of the Fleet Corporation and the duties imposed upon it as an agency of the United States by Acts of Congress and Executive Orders, described and considered in earlier opinions of this court, require a different conclusion with respect to its contracts.

* * *

"In the present case the agent is not an individual and its liability does not involve any expenditure of private funds for the satisfaction of public obligations. Its entire capital stock is government owned. Its funds and property were furnished to it by the government. They and government indemnity are alone the sources from which its obligations will be defrayed.

"It was created as a government agency to construct a fleet of vessels to meet a wartime emergency. It was in order better to fulfill that purpose that Congress chose an instrument having the power to contract as well as all the other powers of a private corporation, but with its every action government controlled and all its assets supplied from government sources. The advantages of resorting to such powers

in meeting the national emergency were urged as grounds for the choice of this particular form of agency, when the Urgent Deficiency Bill was pending in Congress. * * * There is thus no basis for presuming that the Fleet Corporation is not to be deemed bound by the contracts into which it enters merely because it is acting as such an agency."

United States Shipping Board, etc. v. *Harwood,* 381 U. S. 519, 50 S. Ct. R. 372, 373, 74 L. Ed. 1011.

"Where the state creates a commission or other agency and authorizes it to conduct ordinary business ventures, it is immaterial whether the state expressly provides that it may be sued, for such liability arises from the business it is authorized to conduct.

"This is what I understand to be the holding in *Bank of U. S.* v. *Planters' Bank of Ga.,* 9 Wheat. 904, 6 L. Ed. 244.

"This is not a suit against the state, but one against the commission created by the state. When the state made a common carrier, a warehouseman, a cotton compressor, an operator of a grain elevator, a wharfinger and an employer and furnisher of pilots for pay, of the Docks Commission, it necessarily subjected it to the same rules as to suit that other persons and corporations engaged in those various occupations were subject to."

Standard Oil Co. v. *United States,* 25 F. (2d) 480.

"Again, and still treating the question as though involved in the plea to the jurisdiction, that is *not an action* against the college *for a tort committed in the prosecution of any governmental function.* The fee was in the state, but the corporation as equitable owner, was in the possession, use, and enjoyment of the property. For protecting the bottom land, the college, *for its own corporate purposes and advantages,*

constructed the dyke. In so doing it was not acting in any governmental capacity. *The embankment was in law similar to one which might have been built for private purposes by the plaintiff* on the other side of the river. If he had there constructed a dyke to protect his farm, and in so doing had taken or damaged the land of the college, he could have been sued and held liable. In the same way, and on similar principles of justice and legal liability, the college is responsible to him if, for its own benefit, and for protecting land which it held and used, it built a dyke which resulted in taking or damaging the plaintiff's farm. 2 Dill. Mun. Corp., 4th ed. Sec. 966, p. 1180." (Italics ours).

Hopkins v. *Clemson Agl. College,* 221 U. S. 636, 31 S. Ct. R. 654, 55 L. Ed. 890.

It is interesting to note that governmental loan agencies have been held subject to process not provided for in the acts creating them.

"The Home Owners Loan Corporation does not have the powers of either the executive, judicial, or legislative branches of government. It was granted no immunity from civil process. It provides emergency relief to home owners to refinance mortgages, and is subject to the same liabilities as other corporations similarly employed" (Syl. 3).

Central Market, Inc. v. *King,* 132 Neb. 380, 272 N. W. 244, certiorari refused in *Home Owners Loan Corp.* v. *Central Market, Inc.,* 302 U. S. 687, 58 S. Ct. R. 17, 82 L. Ed. 14.

And as to the Federal Land Bank, the court held it was subject to the garnishment and also held:

"Immunity of corporate government agencies from suit and judicial process and their incidentals is less readily implied than immunity from taxation."

Federal Land Bank v. *Priddy*, 295 U. S. 229, 55 S. Ct. R. 705, 79 L. Ed. 1408.

The following is the rule in regard to a state organized corporation:

"When a state creates a corporation for purpose of engaging in private business and acquires part or whole of the capital thereof, it divests itself of its sovereign character as respects such corporation's transactions and cannot claim privileges or immunities of the sovereign as to them" (Syl. 2).

State of North Dakota v. *Olson*, 33 F. (2d) 848 (8 C. C. A.).

From the fact that a state agency was given power to contract and the state was not subject to the indebtedness of this agent, the Kentucky court held that the state had thereby expressed the intention that the Board be treated as a corporation and subject to suit without further expression of the legislature and even though the name of the Board did not indicate a corporation as it does in the pending case.

"The rule is well settled that the state cannot be sued, and that the same protection is extended to the officers of the state. *But this rule does not apply to a corporation* created by the state for certain public purposes. If appellee was made by the acts referred to, a corporation or a quasi corporation, we see no reason why it should be exempted from the rule allowing suits to be brought against corporations on contracts they have made. So the question is presented whether appellee was invested by the legislature with the character of a corporation or quasi corporation.

It is not necessary that the thing created by the legislature should be named by it a corporation. *Its character depends upon the powers given it, and not upon the name by which the legislature may call it.* * * * * it cannot be presumed that it was contemplated that people who dealt with this board should have no one to look to for the enforcement of their just claims. The board was authorized to have a house built, and a restaurant run in it, to employ agents and assistants, and to take all necessary steps to have the state properly represented at that exposition. The commissioners clearly were not personally responsible for their obligations, the state expressly declared that it was not to be responsible, and the only reasonable conclusion is that the board of managers, to whom the $100,000 was committed to carry out the objects of the act, was intended to be, to the extent of the funds put in its hands, at least a quasi corporation; and, as the power to make contracts is expressly conferred, *the power to sue or be sued on these contracts was necessarily vested in the board, for the contracts were the obligations of the board, and not the obligations of the state.* It is true that this board has been called, in an opinion by this court, an 'agency of the state.' It was an agency of the state, but it was *also vested with corporate powers*, and in its corporate capacity it may be sued for its corporate acts, just as any other corporation." (Italics ours.)

Gross v. *Kentucky Board of Managers*, 49 S. W. 458, 105 Ky. 840.

IV. Congressional intent that the "Regional" be subject to suit is expressed by inclusion of word "Corporation" in the name of the respondent "Regional".

Congress did not intend and will not be presumed to have intended to defraud the "petitioner" and others. Yet to

hold that the respondent "Regional" is not subject to suit would be in effect finding Congress intended to commit a fraud on all persons dealing with the "Regional." The full name of the respondent "Regional" is the "Regional Agricultural Credit *Corporation* of Sioux City, Iowa." This name imports a legal entity. No notice is given of any limitation or immunity of the corporation. Such a legal entity dealing in ordinary commercial enterprises, making loans, charging interest and operating a ranch to winter livestock for a stated charge does not give warning it is to claim a sovereign's immunity from suit nor its intention to avoid its responsibility as a commercial corporation. The respondent Regional, obtained "petitioner's" cattle by executing a contract as a corporation.

"The early text-writers and some of the older cases enumerated at least five powers as necessarily incident to every corporation: (a) Perpetual succession, by which is meant the power of admitting members in place of those removed by death or by the transfer of shares, and the continuation as a legal entity notwithstanding such change of membership; (b) to sue and be sued, implead and be impleaded, grant and receive by its corporate name; (c) to purchase, hold and convey real and personal property; (d) to have a common seal and change the same at pleasure; (e) to make by-laws. To these may be added another power incident to certain classes of corporations, that of removing members. Furthermore, the want of an express enumeration of powers does not exclude such incidental powers as are reasonably necessary to accomplish the corporate purpose."

3 Thompson on Corporations, 821 (3d Ed.)

"A corporation may be sued although not expressly made subject to suit by the terms of its charter, not-

withstanding the state is a stockholder or the proprietor of the corporation, because the exemption of a state from suit without its consent does not exempt such a corporation from being sued. Generally speaking, a corporation may be sued in all things touching its corporate duties. Corporate existence implies amenability to legal process."

13 American Jurisprudence 1072, Corporations, Sec. 1155.

In the case of *The Trustees of Dartmouth College* v. *Woodward*, 4 L. Ed. 629, 4 Wheat. 518 (U. S.), Judge Washington in his opinion stated:

"A corporation is defined by Mr. Justice Blackstone to be a franchise. 'It is', says he, 'a franchise for a number of persons, to be incorporated and exist as a body politic, with a power to maintain perpetual succession, and to do corporate acts, and each individual of such corporation is also said to have a franchase, or freedom.' This franchise, like other franchises, is an incorporeal hereditament, issuing out of something real or personal, or concerning or annexed to, and exercisable within a thing corporate. To this grant, or this franchise, the parties are, the king, and the persons for whose benefit it is created, or trustees for them. The assent of both is necessary. * * *

"The rights acquired by the other contracting party are those of having perpetual succession, of suing and being sued, of purchasing lands for the benefit of themselves and their successors, and of having a common seal, and making of by-laws."

In the same case, in an opinion written by Judge Story, it is stated:

"An aggregate corporation at common law is a collection of individuals united into one collective body,

under a special name and possessing certain immunities, privileges, and capacities in its collective character which do not belong to the natural persons composing it. Among other things it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties."

Being a corporation, the capacity to sue is presumed until contrary appears.

"And being a corporation, and the power to sue and be sued being both by statute and the principles of the common law an inseparable incident to corporate existence, the legal capacity to sue will be presumed until the contrary appear. Thompson on Corporations, Sec. 3125."

Martin v. *Kentucky Lands Inv. Co.*, 142 S. W. 1038 (Ky.)

Liability of a foreign corporation to be sued need not be expressed. The power to sue and be sued is an incidental power to doing business.

"The liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there.

"Accordingly, in *Railroad Co.* v. *Harris*, 12 Wall. 65, the Baltimore & Ohio Railroad Company, a corporation chartered by the state of Maryland, and authorized by the statutes of the state of Virginia to extend its railroad into that state, and also by the Act of Congress of March 2, 1831, c. 85 (4 Stat. 476), to extend, construct, and use a lateral branch of its rail-

road into and within the District of Columbia, and to exercise the same powers, rights, and privileges, and be subject to the same restrictions in regard thereto, as provided in its charter, was held, by reason of the Act of Congress, and of service upon its president in the District of Columbia, to be liable to an action in the District by a passenger for an injury happening in the state of Virginia, although the railroad company was a corporation of the state of Maryland only, and neither the Act of Congress authorizing it to construct and use a branch railroad in the District of Columbia, nor any other Act of Congress, had made any provision for bringing suits against foreign corporations."

Barrow S. S. Co. v. *Kane*, 170 U. S. 100, 18 S. Ct. R. 526, 42 L. Ed. 964

Under various comparable situations, persons doing business under a name implying a corporation, have been held to be estopped to deny its corporate capacity and responsibility.

"An estoppel to deny corporate existence may arise, not only from dealing with or from other recognition of a corporation, as shown in the preceding sections, but also from the holding out of an association as a corporporation or participation therein, and such an estoppel may operate either against the association or pretended corporation, or against the individual promoters, stockholders, or members, or persons who have acted as directors, officers, or agents of the pretended corporation, and thus participated in holding it out as a legal corporation."

14 Corpus Juris 235, Corporations, Sec. 253

"The rule of estoppel works both ways; and it is the well settled rule, in some jurisdictions expressly de-

clared by statute, that if an association of persons undertakes to do business in a name which necessarily implies a corporate body, or otherwise holds itself out and acts as a corporation, and executes a note or enters into any other contract as a corporation, or otherwise deals as such, the members are estopped, collectively and individually, to deny its corporate capacity in any action or proceeding arising out of or involving such contract or dealing."

14 Corpus Juris 235, Corporations, Sec. 254

"It has also been held in effect that persons who hold themselves out and do business as a corporation and commit a tort in the course of such business cannot set up want of legal incorporation to escape liability therefor in an action against them as a corporation."

14 C. J. 236, Corporations, Sec. 255

So this court has held public corporations liable on the basis of estoppel where indebtedness was incurred by a corporation not properly organized.

"The rule as stated by Cooley is as follows:

" 'In proceedings where the question whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appear to be acting under color of law, and recognized by the state as such . . . . And the rule, we apprehend, would be no different if the Constitution itself prescribed the manner of incorporation. Even in such a case, *proof that the corporation was acting as such, under legislative action,* would be sufficient evidence of right, except as against the state, and private parties could not enter upon any question of regularity. *And the state itself may justly be precluded, on the principle of estoppel, from raising such an objection, where there has been long acquiescence and recognition.*'

"It was held in *Shapleigh* v. *San Angelo*, 167 U. S. 646, 42 L. Ed. 310, 17 Sup. Ct. Rep. 957, supra, that none but the state could impeach the validity of the creation of a municipal organization, and that if it acquiesced therein the corporate existence could not be collaterally attacked. The court, through Mr. Justice Shiras, said:

" 'The doctrine successfully invoked in the court below by the defendant, that where a municipal incorporation is wholly void ab initio, as being created without warrant of law, it could create no debts and could incur no liabilities, does not, in our opinion, apply to the case of an irregularly organized corporation which had obtained, by compliance with a general law authorizing the formation of municipal corporations, an organization valid as against everybody except the state acting by direct proceedings. Such an organization is merely voidable, *and if the state refrains from acting until after debts are created, the obligations are not destroyed by a dissolution of the corporation, but it will be presumed that the state intended that they should be devolved upon the new corporation which succeeded, by operation of law, to the property and improvements of its predecessor.*' " (Italics ours).

Tulare Irrig. District v. *Shepard*, 185 U. S. 1, 22 S. Ct. R. 531, 46 L. Ed. 773

The rule is statutory in Nebraska:

"No body of men acting as a corporation under the provisions of this article, shall be permitted to set up the want of legal organization as a defense to any action brought against them as a corporation."

Sec. 24-221, Compiled Statutes of Nebr. for 1929

"In *Livingston Loan & Building Ass'n.* v. *Drummond*, 49 Neb. 200, 68 N. W. 375, it was held that a defendant sued as a corporation cannot deny its existence either

in abatement or in bar. If defendant is not a corporation, it cannot appear as such and plead in that capacity. Even if the state were able to question the legal existence of the corporation upon sufficient ground, the defendant could not avail itself of the lack of legal existence and thus commit a sort of legal harakiri in a collateral action of this nature."

Gilligan v. *John Gilligan Co.*, 94 Neb. 437, 143 N. W. 457

V. Immunity of the sovereign from suit does not extend to agents, no agent being an agent for the purpose of committing a tort.

In deciding that Clemson College of South Carolina might be sued and that it did not partake of the state's immunity, Judge Lamar, in an early case, said:

"That ruling and the assignments of error thereon raise the question as to whether a public corporation can avail itself of the state's immunity from suit, in a proceeding against it for so managing the land of the state as to damage or take private property without due process of law.

"*But immunity from suit is a high attribute of sovereignty,—a prerogative of the state itself,—which cannot be availed of by public agents when sued for their own torts.* The 11th Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the state's citizens. To grant them such immunity would be to create a privileged class, free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law. For how 'can these principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit

penalties upon individual offenders * * * whenever they interpose the shield of the state? * * * The whole frame and scheme of the political institutions of this country, state and Federal protest' against extending to any agent the sovereign's exemption from legal process. *Poindexter* v. *Greenhow*, 114 U. S. 270, 291, 5 S. Ct. R. 903, 962, 29 L. Ed. 185, 193.

* * *

"Besides, neither a state nor an individual can confer upon an agent authority to commit a tort, so as to excuse the perpetrator. In such cases the law of agency has no application,—the wrongdoer is treated as a principal, and individually liable for the damages inflicted, and subject to injunction against the commission of acts causing irreparable injury." (Italics ours.)

Hopkins v. *Clemson Agricultural College*, 221 U. S. 636, 31 S. Ct. R. 654, 55 L. Ed. 890.

This rule is especially applicable where the agent of the government is so far removed from a governmental function as to be appointed in the form of a corporation.

"These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if any one would

contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of Government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 842, 843, 6 L. Ed. 204; *United States* v. *Lee*, 106 U. S. 196, 213, 221, 1 S. Ct. R. 240, 27 L. Ed. 171. * * *

"If what we have said is correct it cannot matter that the agent is a corporation rather than a single man. The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law. * * * But the taking possession of the plaintiffs' plants on December 1, 1917, is alleged to have been unlawful and it cannot be assumed at this stage that the act of the Fleet Corporation was in pursuance of any powers then delegated to it or was within the ratification of December 3, 1918. The plaintiffs *are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act.* In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name." (Italics ours.)

Sloan Shipyards Corp. v. *United States Shipping Board*, 258 U. S. 549, 42 S. Ct. R. 386, 66 L. Ed. 762.

The following was said in regard to the United States Housing Corporation:

"The case of *United States* v. *Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171, after a most profound and exhaustive consideration of the question and for basic reasons, decides that in some instances at least suits

may be maintained against individuals, without the consent of the United States, although 'the judgment must depend on the right of the United States to property held by such persons as officers or agents of the government.' It will be noted that in the case just mentioned the question was raised by the government itself, and not by the individual defendants, as was done in the present case. *It is likewise a general rule that when officers of the government act* under invalid authority, or *exceed or abuse their lawful authority, and thereby invade private rights* secured by the Constitution, *an action to redress injuries caused by the unauthorized act is not a suit against the state.* * * * whether the defendants exceeded their authority must depend, as I now see it, upon the acts of the defendants when viewed in the lights of the statute, the orders of the President, and the charter of the defendant corporation. The charter is not now before me. Aside from mere procedure, a due regard for the powers of the government, coupled with proper care lest in the protection of such powers the liberties of the individual, intended to be preserved by the Bill of Rights, be encroached upon or destroyed to the jeopardy, not of individuals alone, but of the government as well, would seem to require that the questions presented under the third and fourth propositions of the defendants be not decided upon a mere preliminary motion, but that consideration thereof be deferred until all material facts are before the court." (Italics ours.)

McComb v. *United States Housing Corp.*, 264 F. 589 (592).

CONCLUSION

Every expression of Congress indicates the "Regional" to be subject to suit. The "Regional" has claimed

the correlated implied power to sue by repeatedly going into court in its own name to bring suit. It has engaged in business enterprises and in every way held itself out as a corporate entity having full powers of an ordinary commercial corporation.

The "Regional" was created as a corporation for the purpose of obtaining private funds which it could in turn lend and obtain a profit on through interest charges. The Congressional debates disclose this through the words of Mr. Steiwer, Senator from Oregon, who introduced and sponsored the amendment to the R. F. C. bill providing for the "Regional". As shown by the Congressional Record for January 21, 1932, he said: "Mr. President, the purpose of setting up the Corporations in the different land bank districts was to create an entity which under the law would be authorized to rediscount with the Federal Intermediate Credit Banks. The R. F. C. could hardly do that if it were merely to appoint agents in different places or appoint an agent in each of the Federal Land Bank districts. A separate entity will be permitted under the existing law, to take notes and rediscount them and thus have a source of money which is not government money at all."

Of course the "Intermediate Banks are capitalized by the United States but they sell their debentures and this amendment will give the farmers an opportunity to secure credit which is derived from private sources."

Thus we see that the "Regional's" funds are not entirely government money. The money loaned petitioners may have been private money. It would be manifestly un-

fair for this court to assume that such a corporation cannot be sued by the private persons from whom it borrows money. It is likewise unfair for it to commit a tort against petitioner and for petitioner to be denied a remedy. In the face of the congressional intent, as shown herein, we submit that the rulings of the court below were erroneous and should be reversed and this case remanded to the district court for such amendments in the pleadings as are necessary and for a trial on the merits.

KEIFER AND KEIFER, etc.
Petitioner,

By E. B. Perry,
Robert Van Pelt,
Lloyd J. Marti,
Arthur E. Perry,
Joseph P. O'Gara,
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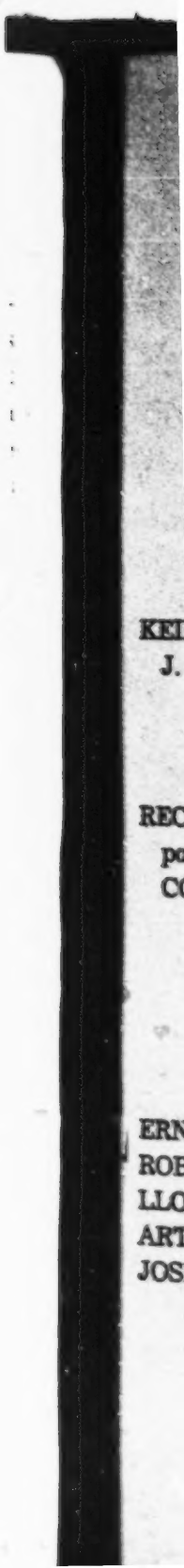

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 364

ER AND KEIFER, a co-partnership, composed of Warren Keifer, Jr., and Oswin Keifer,

Petitioner,

vs.

ONSTRUCTION FINANCE CORPORATION, a corration, and REGIONAL AGRICULTURAL CREDIT RPORATION OF SIOUX CITY, IOWA, a corporation,

Respondents.

REPLY BRIEF OF PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 364

KEIFER AND KEIFER, a co-partnership, composed of J. Warren Keifer, Jr., and Oswin Keifer,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation, and REGIONAL AGRICULTURAL CREDIT CORPORATION OF SIOUX CITY, IOWA, a corporation,

Respondents.

REPLY BRIEF OF PETITIONER

While we appreciate that the rules of the United States Supreme Court make no provision for the filing of a reply brief, we feel constrained to request the court for leave to file this brief for the purpose of calling attention to the inaccuracies and unfairness of certain statements and assertions made in the brief of the respondent, Regional.

The first of these misstatements, which is one of law, is to the effect that "instrumentalities of the federal government are immune from suit unless Congress has unmistakably and expressly subjected them to suit." No case cited by the respondent makes any such statement. The cases cited by the respondent in this respect are only to

the effect that the United States itself as a sovereign, is immune from suit, which latter proposition is so well established as to not be subject to argument. However, the authorities cited, far from sustaining the proposition urged by the respondent, sustain the position taken by us that immunity from suit of an instrumentality is to be determined by the intent of Congress and that the intent of Congress is in this respect determined by the type of entity set up and the nature of its business. The cases cited by respondent so far as pertinent, sustain this rule. For example, the reason for the immunity is stated:

> "A sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

and the reason that the immunity of the sovereign is not extended without the express direction of Congress to any instrumentality such as the Regional, is that it does not have the power to make or change the laws of the land:

> "As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended *to those that, in actual administration, originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights.* A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the territory itself is the fountain from which rights ordinarily flow." *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 27 S. Ct. Rep. 526 (Italics ours).

The following quotation from *Federal Land Bank* v.

Priddy, 295 U. S. 229, 231, 232, states exactly the opposite of what the respondent contended it contained.

> "Whether federal agencies are subjected to suit, and, if so, the extent to which they are amenable to judicial process, *is thus a question of the congressional intent.* See *The Lake Monroe*, 250 U. S. 246, 249, 39 S. Ct. 460, 63 L. Ed. 962; *Sloan Shipyards Corp.* v. *United States Fleet Corp.*, 258 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762; *Missouri Pacific R. Co.* v. *Ault*, 256 U. S. 554, 559, 41 S. Ct. 593, 65 L. Ed. 1087. If the answer is not made plain by the words of the statute, it is necessary to ascertain, by examination of the purposes and organization of the federal farm loan system, whether immunity from attachment is granted by implication" (Italics ours).

Another case cited by the respondent, *The Lake Monroe*, 250 U. S. 246, is an action involving a vessel whose ownership was transferred to the fleet corporation, which is a government owned corporation which was not expressly made subject to suit. Yet, as a result of the fact that this corporation owned the ship named The Lake Monroe, the action was held to lie, although it would not have been held to lie had the ship been owned directly by the government as shown by *The Western Maid*, 257 U. S. 419, also cited by the respondent. The correct rule is well expressed in Syllabus 2 of *Sloan Shipyards Corporation* v. *United States Shipping Board*, 258 U. S. 549, 42 S. Ct. Rep. 386:

> "The exemption of the sovereign from liability to suit does not extend to an agent to whom authority has been delegated by the President merely because he is such agent, whether the agent be an individual or a corporation which in law is a person, so that such agent is answerable for his own acts unless protected by some constitutional rule of law."

The expression of Judge Taft in his dissenting opinion,

which agreed with the majority opinion on that particular point, was in the following language:

> "I concede that the legislation originally creating this corporation, without express immunity from suit, naturally gives rise to the inference that Congress concluded that the greater freedom of action secured by carrying on business in corporate form was desirable and that in the absence of express provision for it, and in respect to what the corporation was originally intended to do, immunity cannot be reasonably implied from the relation of the government to the corporation and its interest in its business."

Another point on which the brief of the respondent is unfair is in the statement of the facts. On page 5 of the respondent's brief, an attempt is made to convey the impression to this court that the Regional was to care for petitioner's cattle as a matter of profit only to the petitioner and without any consideration. This position is not correct in view of the fact that the Regional charged the highly excessive price of $14.00 per head for wintering said livestock as shown by said contract (R. 32).

The Regional tries to amplify this position by then setting out a provision of the contract (R. 32) which particular provision has been held to be void as against public policy by the Eighth Circuit Court of Appeals by virtue of the Nebraska authorities to the effect that a party may not contract against his own negligence. *Gesford* v. *Star Van & Storage Co.*, 104 Neb. 453, 177 N. W. 794.

The inference in respondent's brief is particularly offensive and unfair when the actual facts (which will be proven under petitioner's allegations (See R. 27)), will establish that the recitations in said contract in regard to petitioner's necessity for relief were false and untrue, and that said contract in its entirety was obtained by fraudulent repre-

sentations and coercion, that petitioners had more satisfactory means of caring for said cattle but because of the fraudulent representation and coercion alleged submitted to the Regional attempting to winter said cattle.

Possibly the strongest illustration, however, of the unfairness of the respondent's brief is the contents of the appendix from pages 25 to 50 inclusive. Within those pages of respondent's brief are contained certain portions of correspondence, bulletins and opinions of different employees of either the Reconstruction Finance Corporation, the Regional Agricultural Credit Corporation or government agencies. The respondent would not be able to place the facts asserted in these bulletins in evidence for the reason that they are obviously self-serving, for the further reason that they are simply excerpts and many of them expressly state that they are secret or not for publication.

These 25 pages do not contain any acts of Congress or any judicial opinions. The facts stated in those 25 pages are no more entitled to consideration by this court than our letters written to the petitioner expressing a legal opinion as to its rights in this controversy.

Perhaps the most offensive thing about the appendix is the fact that it contains only excerpts. This becomes particularly significant when it is known that some of the portions stricken are much more pertinent to the issues submitted to this court than the portions attached. An instance of this is in regard to the opinion of the general counsel as to exemption of the Regional Agricultural Credit Corporation from taxation by states and local authorities. The opinion itself is set forth on page 44 of the appendix attached to respondent's brief. However, the brief in support of the opinion which brief is deleted, contains a very significant phrase:

> "A striking analogy between the United States Shipping Board Emergency Fleet Corporation and that of the Regional Agricultural Credit Corporation appears

There is indeed a striking similarity between the Regional Agricultural Credit Corporations formed by the Reconstruction Finance Corporation and the United States Shipping Board Emergency Fleet Corporation formed by the Shipping Board (an incorporated agency immune from suit) and the parallel illustrates that there are far more reasons for holding that Congress intended that the Regional be subject to suit than there was for holding as the court did, that the United States Shipping Board Emergency Fleet Corporation was subject to suit.

Congress has expressed an intention that the Regional be subject to suit by having the R. F. C. form the Regional as a separate and distinct entity, by using the word "corporation" in the Regional's name and by causing the Regional to be organized as a corporation. This intention is further expressed by the very fact that no exemption from suit of the distinct entity so formed was provided and because the Regional was authorized to and did engage in purely business enterprises.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 364

KEIFER AND KEIFER, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION AND REGIONAL AGRICULTURAL CREDIT CORPORATION OF SIOUX CITY, IOWA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RECONSTRUCTION FINANCE CORPORATION IN OPPOSITION

INTRODUCTORY

This brief is limited to a consideration of the question that affects Reconstruction Finance Corporation (hereinafter called R. F. C.) alone as a party in the pending proceeding.

OPINIONS BELOW

The opinion of the District Court (R. 34) is reported in 22 Fed. Supp. 918. The opinion of the Circuit Court of Appeals (R. 44–50) is reported in 97 F. (2d) 812.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 8, 1938 (R. 51). A petition for rehearing was denied and the order entered on August 9, 1938 (R. 63). The petition for a writ of certiorari was filed on September 20, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925.

QUESTION PRESENTED

Whether R. F. C. can be held liable, as principal, for the acts of the Regional Agricultural Credit Corporation (hereinafter called Regional) of Sioux City, Iowa, despite the fact that these acts occurred long after control and supervision over the Regionals had been transferred by statute and Executive Order to the Farm Credit Administration.

STATUTES AND EXECUTIVE ORDER INVOLVED

The applicable statutes and Executive Order are set forth in the Appendix (infra pp. 10 to 21).

STATEMENT

By Section 201 (e) of the Emergency Relief and Construction Act of 1932, approved July 21, 1932, R. F. C. was authorized

> to create in any of the twelve Federal land-bank districts where it may deem the same to be desirable a regional agricultural credit corporation with a paid-up capital of not

> less than $3,000,000, to be subscribed for by the Reconstruction Finance Corporation * * *.

It was further provided that such corporations

> shall be managed by officers and agents to be appointed by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe.

These corporations were authorized to make loans to farmers and stockmen. Interest rates were

> subject to the approval of the Reconstruction Finance Corporation,

and all expenses

> incurred in connection with the operation of such corporations shall be supervised and paid by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe.

Pursuant to this Act R. F. C. issued the charter of the Regional of Sioux City, Iowa, on September 10, 1932 (R. 11–12).

Pursuant to Sections 401 and 403 of the Act of Congress approved June 30, 1932, c. 314, 47 Stat. 413, as amended by Act of Congress approved March 3, 1933, c. 212, 47 Stat. 1517, the President issued Executive Order No. 6084 on March 27, 1933, which provided among other things that

> (5) There are transferred to the jurisdiction and control of the Farm Credit Administration:
>
> * * * * *

> (e) The functions of the Reconstruction Finance Corporation and its board of directors relating to the appointment of officers and agents to manage regional agricultural credit corporations formed under section 201 (e) of the Emergency Relief and Construction Act of 1932; relating to the establishment of rules and regulations for such management; and relating to the approval of loans and advances made by such corporations and of the terms and conditions thereof.

The Executive Order further provided for the transfer of

> The records, property (including office equipment), and personnel used and employed in the execution of the functions hereinbefore transferred

and after considering specific appropriations not here relevant provided that

> * * * All other appropriations, allotments, and other funds available for use in connection with the functions and executive agencies hereby transferred and consolidated are hereby transferred to and vested in the Farm Credit Administration, and shall be available for use by it, for the same purposes as if the Farm Credit Administration were named in the law or authority providing such appropriations, allotments, or other funds.

In addition it provided that

> All power, authority, and duties conferred by law upon any officer, executive agency, or head thereof, from which or from whom transfer is hereinbefore made, in relation to the executive agency or function transferred, are transferred to and vested in the Governor of the Farm Credit Administration.

Executive Order No. 6084 became effective on May 27, 1933, in accordance with its terms and the controlling statutory provisions.

On December 14, 1936, over three years after the transfer of control and supervision over the Regionals from R. F. C. to the Farm Credit Administration, petitioner herein brought suit against respondents herein, alleging that the Regional of Sioux City had received certain livestock on or about October 21, 1934, and after orally agreeing to care for it during the winter 1934–35, had dealt with it in a careless and negligent manner (R. 1–11, 12–13).

It appears on the face of the record, therefore, that the acts complained of occurred over 18 months after the transfer of control and supervision over the Regionals from R. F. C. to the Farm Credit Administration.

Respondents' demurrers (R. 32–34) were sustained by the District Court below (R. 34–35). Petitioner's application for leave to file an amended petition was denied by said court (R. 35–36), and

thereupon petitioner appealed to the Circuit Court of Appeals below (R. 36–37).

The Circuit Court of Appeals affirmed the judgment appealed from with respect to both respondents (R. 43–50, 51). With respect to respondent R. F. C. it held that, since control of the respondent Regional had been transferred from R. F. C. prior to the acts complained of by petitioner, R. F. C. could not be held liable.

ARGUMENT

A

Petitioner is seeking to hold R. F. C. responsible, as principal, for acts of the Regional of Sioux City that occurred more than 18 months after control and supervision over the Regional, and over its management and funds, had been transferred by statute and Executive Order to the Farm Credit Administration.

Nowhere does petitioner question the validity or meaning of the Executive Order effecting the transfer, or of the Act of Congress pursuant to which it was issued; nor does petitioner claim that it is being deprived of any rights which arose prior to the effective date of the Executive Order. But petitioner contends that R. F. C. is liable because the Executive Order did not in specific language state that the charter provisions of the Regional of Sioux City, which recited R. F. C.'s statutory powers, were amended thereby. Merely to state

this contention is to answer it. The charter could not enlarge or prolong R. F. C.'s statutory powers. Transfer of these powers to the Farm Credit Administration stripped R. F. C. of them. They could not continue to be exercised by both agencies. To give substance to petitioner's contention would completely nullify the effectiveness of the Executive Order, which petitioner has conceded on pages 3 and 4 of its petition for a writ of certiorari.

The cases cited by petitioner on pages 17 and 18 of its brief are wholly irrelevant since they relate to the liability of one corporation for the acts of another where actual ownership and control exists.

The Circuit Court of Appeals below, in sustaining R. F. C.'s position, has stated it briefly and well. It said (R. 46):

> So far as the defendant Reconstruction Finance Corporation is concerned, the demurrer was clearly properly sustained. On September 10, 1932, that corporation, pursuant to Act of Congress, created the defendant Regional Agricultural Credit Corporation, of Sioux City, Iowa. By Executive Order, the President transferred control of the defendant Regional Agricultural Credit Corporation from Reconstruction Finance Corporation to the Farm Credit Administration. This order became effective sixty days subsequent to its date. The transfer, however, was actually made approximately a year and a half prior to the time of the transactions and acts complained of by the plain-

tiff. The Reconstruction Finance Corporation could not, therefore, be held liable.

B

It is readily apparent that the instant case presents no special and important reasons for the granting of a writ of certiorari with respect to respondent R. F. C.

The question presented is not an important question of federal law which has not been, but should be, settled by this Court.

Nor is there a conflict between the Circuit Court of Appeals below and the decisions of another Circuit Court or of the local court. Nor has the Circuit Court of Appeals below departed from applicable decisions of this Court or from an accepted course of judicial proceedings.

Indeed, no adequate reason is assigned by petitioner for the granting of its petition in respect to respondent R. F. C.

Accordingly, if a writ of certiorari is granted it should be limited to the first question presented in petitioner's petition. This Court has many times limited its review to questions warranting its consideration, and its power so to do is undoubted. *L. P. Larson, Jr. Co.* v. *William Wrigley, Jr. Co.*, 277 U. S. 97, 275 U. S. 521; *Ticonic National Bank et al.*, v. *Sprague*, 302 U. S. 675.

CONCLUSION

The instant case presents no special and important reasons for the granting of a writ of certiorari with respect to respondent R. F. C. Accordingly, it is respectfully submitted that if a writ of certiorari is granted it should be limited to the first question presented in petitioner's petition for a writ of certiorari.

CLAUDE E. HAMILTON, JR.,
General Counsel,
C. J. DUBB,
Assistant General Counsel,
HANS A. KLAGSBRUNN,
Counsel,
Reconstruction Finance Corporation.

OCTOBER, 1938

APPENDIX

Section 201 (e) of the Emergency Relief and Construction Act of 1932, approved July 21, 1932:

(e) The Reconstruction Finance Corporation is further authorized to create in any of the twelve Federal land-bank districts where it may deem the same to be desirable a regional agricultural credit corporation with a paid-up capital of not less than $3,000,000, to be subscribed for by the Reconstruction Finance Corporation and paid for out of the unexpended balance of the amounts allocated and made available to the Secretary of Agriculture under section 2 of the Reconstruction Finance Corporation Act. Such corporations shall be managed by officers and agents to be appointed by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe. Such corporations are hereby authorized and empowered to make loans or advances to farmers and stockmen, the proceeds of which are to be used for an agricultural purpose (including crop production), or for the raising, breeding, fattening, or marketing of livestock, to charge such rates of interest or discount thereon as in their judgment are fair and equitable, subject to the approval of the Reconstruction Finance Corporation, and to rediscount with the Reconstruction Finance Corporation and the various Federal reserve banks and Federal intermediate credit banks any paper that they acquire which is eligible for such purpose. All expenses in-

curred in connection with the operation of such corporations shall be supervised and paid by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe.

Title IV of the Act of Congress approved June 30, 1932, c. 314, 47 Stat. 413, as amended by Act of Congress approved March 3, 1933, c. 212, 47 Stat. 1517:

TITLE IV—REORGANIZATION OF EXECUTIVE DEPARTMENTS

Declaration of Standard

SEC. 401. The Congress hereby declares that a serious emergency exists by reason of the general economic depression; that it is imperative to reduce drastically governmental expenditures; and that such reduction may be accomplished in great measure by proceeding immediately under the provisions of this title.

Accordingly, the President shall investigate the present organization of all executive and administrative agencies of the Government and shall determine what changes therein are necessary to accomplish the following purposes:

(a) To reduce expenditures to the fullest extent consistent with the efficient operation of the Government;

(b) To increase the efficiency of the operations of the Government to the fullest extent practicable within the revenues;

(c) To group, coordinate, and consolidate executive and administrative agencies of the Government, as nearly as may be, according to major purposes;

(d) To reduce the number of such agencies by consolidating those having similar functions under a single head, and by abolishing such agencies and/or such functions thereof as may not be necessary for the efficient conduct of the Government;

(e) To eliminate overlapping and duplication of effort; and

(f) To segregate regulatory agencies and functions from those of an administrative and executive character.

Definition of Executive Agency

SEC. 402. When used in this title, the term "executive agency" means any commission, independent establishment, board, bureau, division, service, or office in the executive branch of the Government and, except as provided in section 403, includes the executive departments.

Power of President

SEC. 403. Whenever the President, after investigation, shall find and declare that any regrouping, consolidation, transfer, or abolition of any executive agency or agencies and/or the functions thereof is necessary to accomplish any of the purposes set forth in section 401 of this title, he may by Executive order—

(a) Transfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency;

(b) Consolidate the functions vested in any executive agency; or

(c) Abolish the whole or any part of any executive agency and/or the functions thereof; and

(d) Designate and fix the name and functions of any consolidated activity or executive agency and the title, powers, and duties of its executive head; except that the President shall not have authority under this title to abolish or transfer an executive department and/or all the functions thereof.

SEC. 404. The President's order directing any transfer, consolidation, or elimination under the provisions of this title shall also make provision for the transfer or other disposition of the records, property (including office equipment), and personnel, affected by such transfer, consolidation, or elimination. In any case of a transfer or consolidation under the provisions of this title, the President's order shall also make provision for the transfer of such unexpended balances of appropriations available for use in connection with the function or agency transferred or consolidated, as he deems necessary by reason of the transfer or consolidation, for use in connection with the transferred or consolidated function or for the use of the agency to which the transfer is made or of the agency resulting from such consolidation.

Saving Provisions

SEC. 405. (a) All orders, rules, regulations, permits, or other privileges made, issued, or granted by or in respect of any executive agency or function transferred or consolidated with any other executive agency or function under the provisions of this title, and in effect at the time of the transfer or consolidation, shall continue in effect to the same extent as if such transfer or consolidation had not occurred, until modified, superseded, or repealed.

(b) No suit, action, or other proceeding lawfully commenced by or against the head of any executive agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of any transfer of authority, power, and duties from one officer or executive agency of the Government to another under the provisions of this title, but the court, on motion or supplemental petition filed at any time within twelve months after such transfer takes effect, showing a necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, may allow the same to be maintained by or against the head of the executive agency or other officer of the United States to whom the authority, powers, and duties are transferred.

(c) All laws relating to any executive agency or function transferred or consolidated with any other executive agency or function under the provisions of this title, shall, in so far as such laws are not inapplicable, remain in full force and effect, and shall be administered by the head of the executive agency to which the transfer is made or with which the consolidation is effected.

Winding Up Affairs of Agencies

SEC. 406. In the case of the elimination of any executive agency or function, the President's order providing for such elimination shall make provision for winding up the affairs of the executive agency eliminated or the affairs of the executive agency with respect to the functions eliminated, as the case may be.

Effective Date of Executive Order

SEC. 407. Whenever the President makes an Executive order under the provisions of this title, such Executive order shall be submitted to the Congress while in session and shall not become effective until after the expiration of sixty calendar days after such transmission, unless Congress shall by law provide for an earlier effective date of such Executive order or orders: *Provided,* That if Congress shall adjourn before the expiration of sixty calendar days from the date of such transmission such Executive order shall not become effective until after the expiration of sixty calendar days from the opening day of the next succeeding regular or special session.

Appropriations Impounded

SEC. 408. The appropriations or portions of appropriations unexpended by reason of the operation of this title shall not be used for any purpose but shall be impounded and returned to the Treasury.

Termination of Power

SEC. 409. The authority granted to the President under section 403 shall terminate upon the expiration of two years after the date of enactment of this Act unless otherwise provided by Congress.

EXECUTIVE ORDER No. 6084

WHEREAS sections 401 and 403 of Title IV of Part II of the Legislative Appropriation Act, fiscal

year 1933, as amended by an act of Congress approved March 3, 1933, provide:

SEC. 401. The Congress hereby declares that a serious emergency exists by reason of the general economic depression; that it is imperative to reduce drastically governmental expenditures; and that such reduction may be accomplished in great measure by proceeding immediately under the provisions of this title.

Accordingly, the President shall investigate the present organization of all executive and administrative agencies of the Government and shall determine what changes therein are necessary to accomplish the following purposes:

(*a*) To reduce expenditures to the fullest extent consistent with the efficient operation of the Government;

(*b*) To increase the efficiency of the operations of the Government to the fullest extent practicable within the revenues;

(*c*) To group, coordinate, and consolidate executive and administrative agencies of the Government, as nearly as may be, according to major purposes;

(*d*) To reduce the number of such agencies by consolidating those having similar functions under a single head, and by abolishing such agencies and/or such functions thereof as may not be necessary for the efficient conduct of the Government;

(*e*) To eliminate overlapping and duplication of effort; and

(*f*) To segregate regulatory agencies and functions from those of an administrative and executive character.

SEC. 403. Whenever the President, after investigation, shall find and declare that any regrouping, consolidation, transfer, or abo-

lition of any executive agency or agencies and/or the functions thereof is necessary to accomplish any of the purposes set forth in section 401 of this title, he may by Executive order—

(*a*) Transfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency;

(*b*) Consolidate the functions vested in any executive agency; or

(*c*) Abolish the whole or any part of any executive agency and/or the functions thereof; and

(*d*) Designate and fix the name and functions of any consolidated activity or executive agency and the title, powers, and duties of its executive head; except that the President shall not have authority under this title to abolish or transfer an executive department and/or all the functions thereof.

NOW, THEREFORE, pursuant to the authority so vested in me, and after investigation, it is found and declared that the following changes in executive agencies and the functions thereof are necessary to accomplish the purposes set forth in section 401 above recited, and it is hereby ordered that:

(1) The functions of the Secretary of Agriculture as a member of the Federal Farm Board, and the offices of the appointed members of the Federal Farm Board, except the office of the member designated as chairman thereof, are abolished.

(2) The name of the Federal Farm Board is changed to the Farm Credit Administration.

(3) The name of the office of Chairman of the Federal Farm Board is changed to Governor of the

Farm Credit Administration, and he is vested with all the powers and duties of the Federal Farm Board.

(4) The functions of the Secretary of the Treasury as a member of the Federal Farm Loan Board, and the offices of the appointed members of the Federal Farm Loan Board, except the office of the member designated as Farm Loan Commissioner, are abolished, and all the powers and functions of the Federal Farm Loan Board are transferred to and vested in the Farm Loan Commissioner, subject to the jurisdiction and control of the Farm Credit Administration as herein provided.

(5) There are transferred to the jurisdiction and control of the Farm Credit Administration:

(*a*) The Federal Farm Loan Bureau and the functions thereof; together with the functions of the Federal Farm Loan Board, including the functions of the Farm Loan Commissioner;

(*b*) The functions of the Treasury Department and the Department of Agriculture, and the Secretaries thereof, under Executive Authorizations to give aid to farmers, dated July 26, 1918, and any extensions or amendments thereof;

(*c*) The functions of the Secretary of Agriculture under all provisions of law relating to the making of advances or loans to farmers, fruit growers, producers and owners of livestock and crops, and to individuals for the purpose of assisting in forming or increasing the capital stock of agricultural-credit corporations, livestock-loan companies, or like organizations, except Public Resolution No. 74, Seventieth Congress, approved December 21, 1928, providing for the Porto Rican Hurricane Relief Commission;

(*d*) The Crop Production Loan Office and the eed Loan Office of the Department of Agriculture, nd the functions thereof;

(*e*) The functions of the Reconstruction Fi- nce Corporation and its board of directors elating to the appointment of officers and agents manage regional agricultural credit corporations rmed under section 201 (*e*) of the Emergency elief and Construction Act of 1932; relating to e establishment of rules and regulations for such anagement; and relating to the approval of loans nd advances made by such corporations and of the rms and conditions thereof.

(6) The functions vested in the Federal Farm oard by section 9 of the Agricultural Marketing ct are abolished, except that such functions shall ntinue to be exercised to such extent and for such me as may be necessary to permit the orderly nding up of the activities of stabilization corpo- tions heretofore recognized under authority of ch section, and the Governor of the Farm Credit dministration shall take appropriate action for nding up at the earliest practicable date the ac- ities of such corporations and all affairs related the exercise of such functions.

(7) The records, property (including office uipment), and personnel used and employed in e execution of the functions hereinbefore trans- rred are transferred to the jurisdiction and con- l of the Farm Credit Administration.

(8) The sum of $2,000,000 of the unexpended lances of appropriations made to the Federal rm Board by Public Resolutions No. 43 and No. of the Seventy-second Congress shall be im- unded and returned to the Treasury, which sum

shall be in addition to the other savings to be effected by the Farm Credit Administration as a result of this order.

(9) The unexpended balances of appropriations to the Secretary of Agriculture, the Federal Farm Loan Bureau, and the Federal Farm Board for salaries, expenses, and all other administrative expenditures in the execution of the functions herein vested in the Farm Credit Administration shall be transferred to and vested in the Farm Credit Administration as a single fund for its use for salaries, expenses, and all other administrative expenditures for the execution of any or all of such functions without restriction as to the particular functions for the execution of which the same were originally appropriated. All other appropriations, allotments, and other funds available for use in connection with the functions and executive agencies hereby transferred and consolidated are hereby transferred to and vested in the Farm Credit Administration, and shall be available for use by it, for the same purposes as if the Farm Credit Administration were named in the law or authority providing such appropriations, allotments, or other funds.

(10) All power, authority, and duties conferred by law upon any officer, executive agency, or head thereof, from which or from whom transfer is hereinbefore made, in relation to the executive agency or function transferred, are transferred to and vested in the Governor of the Farm Credit Administration.

(11) The Governor of the Farm Credit Administration is directed to dismiss, furlough, transfer, or make other appropriate disposition of such of

the officers and employees under his jurisdiction and control as are not required for the proper execution of the functions of the Farm Credit Administration.

(12) The Governor of the Farm Credit Administration is authorized to execute any and all functions and perform any and all duties vested in him through such persons as he shall by order designate or employ.

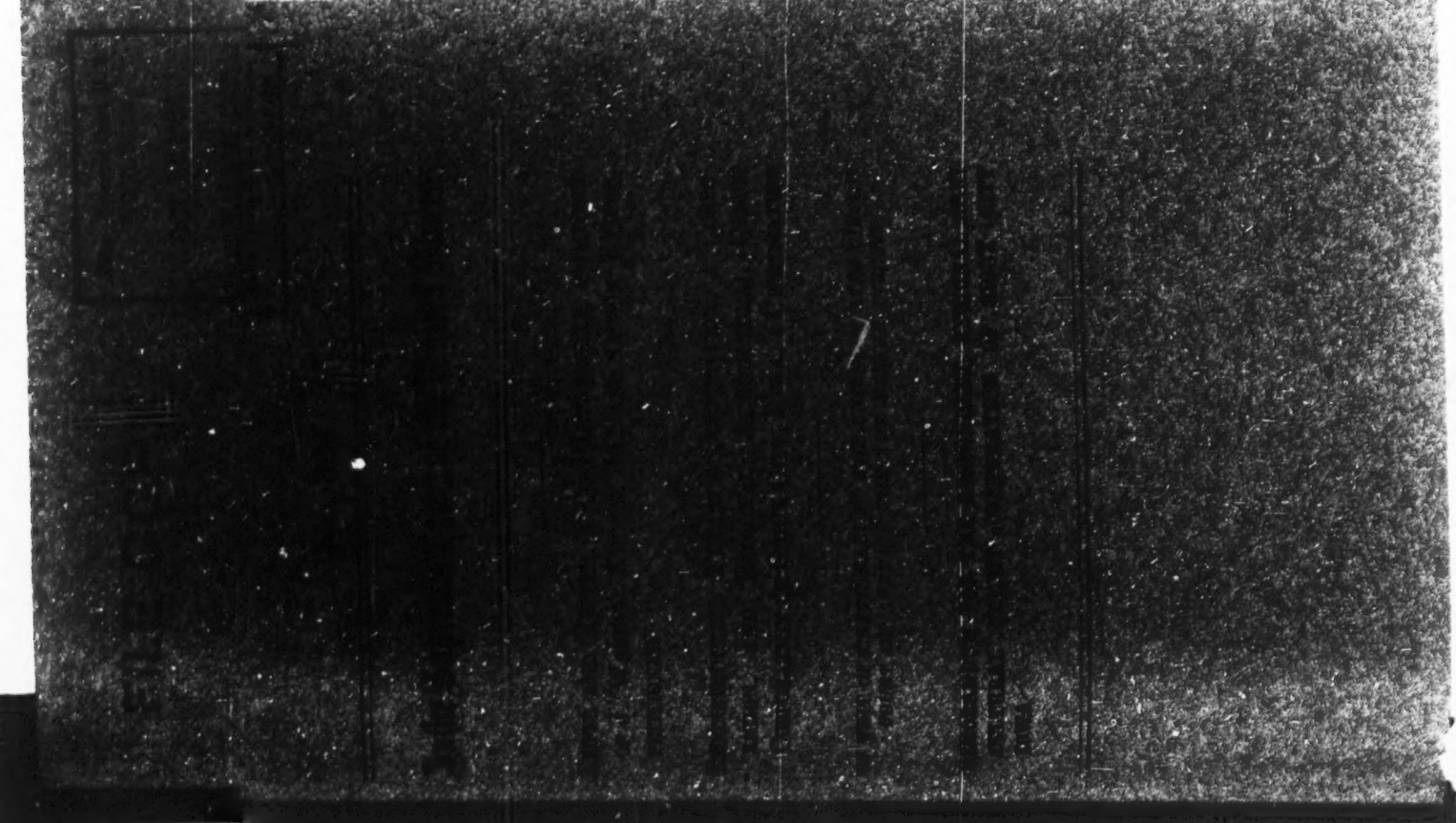
(13) The Governor of the Farm Credit Administration, by order or rules and regulations, may consolidate, regroup, and transfer offices, bureaus, activities, and functions in the Farm Credit Administration, so far as may be required to carry out the purposes to which this order is directed, and may fix or change the names of such offices, bureaus, and activities and the duties, powers, and titles of their executive heads.

This order shall take effect upon the sixty-first calendar day after its transmission to Congress unless otherwise determined in accordance with the provisions of section 407 of the act cited above, as amended.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,
March 27, 1933.

U. S. GOVERNMENT PRINTING OFFICE, 1933



In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 364

[illegible] AND KEIFER, A CO-PARTNERSHIP, COMPOSED OF J. WARREN KEIFER, JR., AND OSWIN KEIFER, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, AND REGIONAL AGRICULTURAL CREDIT CORPORATION OF SIOUX CITY, IOWA, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT, REGIONAL AGRICULTURAL CREDIT CORPORATION OF SIOUX CITY, IOWA

This memorandum is submitted on behalf of the respondent, Regional Agricultural Credit Corporation of Sioux City, Iowa, alone. It is believed that the decision of the court below is correct in the absence of a clear indication that Congress in-

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tended that this respondent should not share the sovereign immunity from suit. In view, however, of the substantial conflict with the decision of the Supreme Court of Minnesota in *Casper* v. *Regional Agricultural Credit Corporation,* 278 N. W. 896, on this question which is likely to arise in other cases, the petition for certiorari is not opposed by this respondent.

Executive Order of the President, No. 6084, Section (5) (e), dated March 27, 1933, effective on May 27, 1933, transferred to the jurisdiction and control of the Farm Credit Administration the functions of the Reconstruction Finance Corporation relating to the management of regional agricultural credit corporations. Section 4 of the Reconstruction Finance Corporation Act of January 22, 1932, c. 8, 47 Stat. 6 (Section 604, Title 15, U. S. C.), provides in part that the Reconstruction Finance Corporation shall have power to sue and be sued. The Farm Credit Administration may not be sued.

The opinion of the Supreme Court of Minnesota and the opinion of the court below do not expressly rely on a distinction which might be suggested between transactions entered into or acts done by a regional agricultural credit corporation before May 27, 1933, and transactions entered into or acts done thereafter, as in the present case. The opinion in the *Casper* case discloses that the mortgage in-

volved was executed before May 27, 1933, but the act of conversion complained of occurred after that date.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

PEYTON R. EVANS,
General Counsel,
Farm Credit Administration.

U. S. GOVERNMENT PRINTING OFFICE: 1939

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 364

KEIFER AND KEIFER, A CO-PARTNERSHIP, COMPOSED OF J. WARREN KEIFER, JR., AND OSWIN KEIFER, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION AND REGIONAL AGRICULTURAL CREDIT CORPORATION OF SIOUX CITY, IOWA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT, REGIONAL AGRICULTURAL CREDIT CORPORATION OF SIOUX CITY, IOWA

OPINIONS BELOW

The opinion of the United States District Court for the District of Nebraska, Omaha Division (R. 35), is reported in 22 F. Supp. 918. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 42–48) is reported in 97 F. (2d) 812.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on July 8, 1938 (R. 49). A petition for rehearing was denied on August 9, 1938 (R. 57). The petition for a writ of certiorari was filed on September 20, 1938, and was granted on October 24, 1938, limited to the first question presented in the petition (R. 59). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

By the terms of the writ of certiorari, the only question presented is whether a regional agricultural credit corporation created by the Reconstruction Finance Corporation is subject to suit in tort.

STATUTES, EXECUTIVE ORDER, AND REGULATIONS INVOLVED

The applicable portions of the statutes, executive order, and regulations involved are set forth in the Appendix, *infra*, pp. 25–56.

STATEMENT

The petitioner and its four assignors will be referred to herein as "petitioner," the Reconstruction Finance Corporation as the "R. F. C.," and the Regional Agricultural Credit Corporation of Sioux City, Iowa, as "Regional."

By section 201 (e) of the Emergency Relief and Construction Act of 1932, c. 520, 47 Stat. 709, 713, approved July 21, 1932, *infra*, p. 25, the R. F. C.

was authorized to create regional agricultural credit corporations in any of the twelve Federal land-bank districts. By this section they were authorized and empowered to make loans or advances to farmers and stockmen at fair interest or discount rates, the proceeds to be used by the recipients for agricultural purposes or in the raising and marketing of live stock. Each regional was to have a paid-up capital of not less than $3,000,000, to be subscribed for by the R. F. C. from the unexpended balance of funds theretofore allocated by Congress to the Secretary of Agriculture. They were to be managed by officers and agents appointed by the R. F. C. under such rules and regulations as its board of directors might prescribe. They could rediscount any eligible paper they acquired with the R. F. C., the Federal Reserve banks, and the Federal intermediate credit banks. The R. F. C. was to supervise and pay all expenses incurred in their operation under such rules and regulations as the R. F. C.'s board of directors might prescribe.

Under and pursuant to that statutory provision, on September 10, 1932, the R. F. C. created and granted a charter to respondent Regional, empowering it to act in the States of Iowa, Nebraska, South Dakota, and Wyoming, comprising Federal Land Bank District Number Eight (R. 11–12). Its charter authorized and empowered it "to do and perform all acts and transact all business which, by implication or otherwise, is permitted legally to be done, performed and transacted by a regional agricultural credit corporation, under and in accordance

with the act of Congress, approved July 21, 1932, known as the 'Emergency Relief and Construction Act of 1932,' and to do all other things incidental thereto, and necessary or appropriate in connection therewith, within the States of Iowa, Nebraska, South Dakota, and Wyoming, and within such other state or states, or parts thereof, as the Reconstruction Finance Corporation, acting by and through its Board of Directors, may at any time and from time to time prescribe or permit" (R. 12).

After the creation of the Regional, but over a year and a half before any of the acts complained of in this case, the functions of the R. F. C. relating to the management of the regionals were transferred to the jurisdiction and control of the Farm Credit Administration by Executive Order of the President No. 6084, dated March 27, 1933, issued pursuant to sections 401 and 403 of the Act approved June 30, 1932, c. 314, 47 Stat. 382, 413, as amended by section 16 of the Act approved March 3, 1933, c. 212, 47 Stat. 1489, 1517. By section 407 of the Act of 1932, as amended by the Act of 1933, and by its terms, the Executive Order was effective as of May 27, 1933.

The petitioner's petition, or complaint (R. 1–13), and supplemental petition (R. 25–33), filed in the District Court for the District of Nebraska, Omaha Division, alleges as to the first cause of action that on or about October 21, 1934, the petitioner delivered to Regional 388 head of cattle, that Regional agreed to winter said livestock and return it to petitioner in the spring in good condition, that Regional by false and fraudulent representations and

coercion induced petitioner to enter into a contract waiving damages, that through Regional's negligent conduct in care of the livestock it was injured and the petitioner was damaged (R. 2–6). Similar allegations are made with respect to four other causes of action for different lots of livestock (R. 6–11).

The written "Cattle Feeding Contract" (R. 32–33), dated November 3, 1934, with respect to the first cause of action, states that the petitioner had given Regional a chattel mortgage dated September 30, 1933, on the 388 head of cattle; that the petitioner was unable to provide sufficient feed and water for its livestock; that it was agreed that Regional might take possession of the livestock described in the chattel mortgage; that it was agreed that Regional would furnish feed and care to the livestock until May 1, 1935, at which time, provided that all the terms and conditions of the contract and of the chattel mortgage had been complied with, the petitioner agreed to remove the livestock.

It was further agreed (R. 33):

> Inasmuch as this service is undertaken by the corporation [Regional] as an emergency relief measure in an effort to preserve the said live stock for the benefit of the mortgagor, it is agreed that all loss to said live stock from death, injury, disappearance, or any other cause shall be borne by the mortgagor.

Pursuant to the agreement, Regional wintered the cattle on a ranch near Whitman, Nebraska (R. 3).

122709—39——2

On December 14, 1936, the petitioner instituted this action and filed its petition in the District Court of the United States for the District of Nebraska, Omaha Division, against the R. F. C. and Regional (R. 1), alleging that the petitioner's cattle were negligently kept during the winter of 1934–1935, and that the petitioner was damaged thereby (R. 3–11). Regional demurred (R. 33–34) to the petition and supplemental petition on the ground, among others, that the court had no jurisdiction of the person of the Regional or the subject of the action (R. 34). The R. F. C. demurred (R. 34–35) on the ground, among others, that the court had no jurisdiction of the subject matter of the action (R. 34).

The District Court sustained the demurrers and dismissed the case (R. 36). The court below affirmed on the grounds that the R. F. C. could not be held liable because control of Regional had been transferred from the R. F. C. to the Farm Credit Administration before the acts complained of and that Regional is a governmental agency which is immune from suit (R. 42–48).

The petition for certiorari sought review not only of the question whether Regional is suable in tort but also the question whether R. F. C. is liable in this case. Regional did not oppose certiorari on the first question in view of the conflict with *Casper* v. *Regional Agricultural Credit Corporation*, 278 N. W. 896 (Supreme Court of Minnesota). The order granting certiorari limited review "to the first question presented in the petition" (R. 59).

SUMMARY OF ARGUMENT

I. Instrumentalities of the Federal Government, of which Regional is one, are immune from suit unless Congress has unmistakably and expressly subjected them to suit.

A. Congress has not expressly subjected Regional to suit. The fact that Congress has expressly subjected other governmental corporate instrumentalities to suit when that result was intended strongly supports the view that Congress did not intend Regionals to be subject to suit.

B. Congress has not impliedly subjected Regional to suit. The fact that R. F. C. is subject to suit does not make Regional subject to suit. The fact that Regional was formed as a corporation does not subject it to suit because the controlling factor is the governmental purpose to be accomplished by Regional—not its corporate form. The activities of Regional are governmental in character and do not support an inference that Congress intended it to be subject to suit.

II. In any event Regional is not subject to this suit in tort. Even if Regional were subject to suit the statutory waiver of immunity would not extend to unauthorized tortious acts of its agents or employees.

ARGUMENT

Regional agricultural credit corporations are instrumentalities of the Federal Government engaged in performing important public functions,

with funds supplied wholly by the Governm
within that part of the Federal banking and cr
system which is conducted by the Farm Credit
ministration.[1] They have the attributes comm
found in all agencies of the Federal Governm
such as use of the standard form of oath requi
of all officers and employees of the Federal G
ernment,[2] the postal franking privilege,[3] the G
ernment rate for telegrams,[4] non-liability, as
strumentalities of the United States, for Fede
capital stock taxes,[5] for Federal stamp taxes,[6]
clerks' and marshals' fees in Federal courts,[7] a
for state and local taxes.[8] Frauds upon a regio
corporation are offenses against the United State

The regionals deposited their funds in the Fe
eral Reserve Bank of the district in which
particular regional was located, and the Ba
transmitted the funds to the Treasurer of t

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[1] Report of the Farm Credit Administration, 1934, pp. 5
64; Agricultural Adjustment in 1934 (Annual Report, Agr
cultural Adjustment Administration, U. S. Department
Agriculture), pp. 17–20, 30.

[2] Regional Agricultural Credit Corporations (R. A. C. C.
Bullettin No. 7, *infra*, p. 31.

[3] R. A. C. C. Bulletin No. 10, *infra*, p. 33.

[4] R. A. C. C. Bulletin No. 5, *infra*, p. 31; see *Emergenc*
Fleet Corp. v. *Western Union*, 275 U. S. 415.

[5] R. A. C. C. Bulletin No. 200, *infra*, p. 34.

[6] R. A. C. C. Bulletin No. 321, *infra*, p. 41.

[7] R. A. C. C. Bulletin No. 282, *infra*, p. 37.

[8] R. A. C. C. Bulletin No. 279, *infra*, p. 45.

[9] Act of June 16, 1933, c. 98, Sec. 64 (a), 48 Stat. 267, a
amended (U. S. C., Title 12, Sec. 1138d).

United States to be held, together with the capital funds of the regionals, in the Treasury of the United States. Money loaned by the regionals, or expenditures made by them, were paid by checks and vouchers drawn on the Treasurer of the United States in the form authorized and approved by the Treasury Department. Upon the reduction of their capital the regionals were directed by the Farm Credit Administration to deposit the funds representing such reduction of capital with the Treasurer of the United States to the credit of the Revolving Fund provided for in Section 84 of the Farm Credit Act of 1933, c. 98, 48 Stat. 257, 273. When it appeared that certain capital funds of the regionals were not needed for their operation, they were covered back into the Treasury of the United States, where they were available to be used again as part of the capital of other regionals, or for such other purposes as Congress might by statute subsequently direct.[10]

In the present case the "Cattle Feeding Contract" (R. 32–33) expressly recognized that the care of petitioner's cattle, for which petitioner could not supply sufficient feed and water and upon which Regional held a chattel mortgage, was undertaken by Regional "as an emergency relief measure * * *."

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[10] R. A. C. C. Bulletins No. 8 (pp. 8, 9) and No. 51, *infra*, pp. 45, 48.

The petitioner asserts that Regional may be sued in tort for damages arising out of injury to the cattle while in Regional's custody under the contract. The respondent Regional submits that (I) Congress has not subjected it to suit, and (II) in any event Congress has not subjected it to suit in tort.

I

CONGRESS HAS NOT SUBJECTED REGIONALS TO SUIT

Instrumentalities of the Federal Government, of which Regional unquestionably is one, are immune from suit, as well as the United States itself (*Lynch* v. *United States*, 292 U. S. 571, 582; cf. *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353), unless by statute Congress has subjected them to suit. *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 231; *Missouri Pacific R. Co.* v. *Ault*, 256 U. S. 554, 559; *The Lake Monroe*, 250 U. S. 246, 249; cf. *The Western Maid*, 257 U. S. 419, 433. There is no distinction between suits against the Government and suits against the property of the United States. *Stanley* v. *Schwalby*, 147 U. S. 508, 512; *Carr* v. *United States*, 98 U. S. 433. Until consent was given by the Act of March 4, 1931 (46 Stat. 1528), it was impossible for a private mortgagee to obtain an adjudication touching upon any mortgage or other lien claimed by the United States upon real estate. It is a settled rule, repeatedly stated by this Court, that "The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit beyond what the language requires." *Eastern*

Transp. Co. v. *United States*, 272 U. S. 675, 686; *United States* v. *Griffin*, 303 U. S. 226, 239; *United States* v. *Michel*, 282 U. S. 656, 659; *Price* v. *United States*, 174 U. S. 373, 375–376. So far as these instrumentalities "partake of the sovereign character of the United States, Congress has full power to determine the extent to which they may be subjected to suit and judicial process." *Federal Land Bank* v. *Priddy*, *supra*, at p. 231.

The respondent contends that under these rules of law a Federal Government instrumentality is not subject to suit unless a statute expressly so provides. Congress has not subjected Regional to suit (A) expressly or (B) by implication.

A. CONGRESS HAS NOT EXPRESSLY SUBJECTED REGIONALS TO SUIT

1. The most significant, and, we think, controlling factor in this case is that no statute expressly subjects regionals to suit. The statute authorizing the creation of regionals (Section 201 (e) of the Act of July 21, 1932, *infra*, p. 25), does not provide that they may be sued. The legislative history of the statute does not indicate that Congress in-

[11] The provision for regionals originated in amendment proposed from the floor of the Senate, June 25, 1932, during the debate on H. R. 12445, 72d Congress, 1st Session. The amendment was proposed and expounded by Senator Steiwar and was adopted by the Senate with slight amendments, after being debated at some length (75 Cong. Rec. 13572). Nothing was said on the Senate floor concerning the suability of the regionals. The conference report on H. R. 12445 makes no reference to that subject (Rept. No. 1760, H. R., 72d Cong., 1st Session). The conference report was adopted by both Houses, and the bill was passed containing the provision for regionals in its present form.

tended regionals to be sued.[11] The charter of Regional dated September 10, 1932 (R. 11–12) does not provide that it may be sued. The Executive Order, effective May 27, 1933 (*infra*, p. 26), transferring the functions of the R. F. C. with respect to management of regionals to the jurisdiction and control of the Farm Credit Administration does not subject regionals to suit. None of the subsequent statutes with respect to regionals subject them to suit. Farm Credit Act of 1933, Sec. 64, c. 98, 48 Stat. 257, 267–268, as amended, U. S. C., Title 12, Sec. 1138d, with respect to unlawful acts and penalties; Farm Credit Act of 1937, Secs. 33-34, c. 704, 50 Stat. 703, 716–717, U. S. C., Sup. III, Title 12, Sec. 1148 with respect to additional powers of regionals.

The respondent submits that, in this absence of a clear statutory expression of Congressional intent to subject regionals to suit, the general rule, that Federal instrumentalities are immune from suit, prevails.

2. The respondent's contention that regionals are immune from suit in the absence of a contrary intent of Congress expressed in a statute is sup-

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That bill was returned to the House of Representatives by the President, without approval, July 11, 1932 (Doc. No. 360, H. R., 72d Cong., 1st Session). The provision for regionals was immediately revived as part of an extensive amendment to H. R. 9642, and was adopted in its present form. No mention of suability was made in the brief reference to regionals in the conference report on H. R. 9642 (Rept. No. 1777, H. R., 72d Cong., 1st Session, p. 19). There was no debate in either house on the provision, which was enacted as section 201 (e) of Pub. No. 302, 72d Cong., 1st Session.

ported strongly by the consideration that where Congress has intended its corporate instrumentalities to be subject to suit it has expressly so provided either by direct provision with respect to subjection to suit or by the creation of the instrumentality under general statutes of incorporation of a State or the District of Columbia providing for subjection to suit. *Olsen* v. *U. S. Spruce Co.*, 267 U. S. 462; *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549, 565, 570; *Hopkins* v. *Clemson College*, 221 U. S. 636; *Federal Sugar Refining Co.* v. *U. S. Sugar Equalization Board, Inc.*, 268 Fed. 575 (S. D. N. Y.).

Thirty-seven of forty-three governmental corporations created by acts of Congress were expressly authorized by the Federal statutes to sue and be sued, but six, including regionals, were not so authorized.[12] The respondent submits that the omission in the case of regionals, in view of the settled practice to subject Government corporations to suit expressly by statute if that result was intended, strongly indicates that Congress did not intend regionals to be subject to suit.

3. No judicial decision except *Casper* v. *Regional Agricultural Credit Corp.*, 278 N. W. 896 (Sup. Ct. Minn.) in conflict with the decision of the court below in this case, so far as respondent is aware, has held a Federal Government corporation subject to suit in the absence of an express provision in an

[12] See Appendix, *infra*, pp. 51–56 for a list of these government corporations and the applicable statutory provisions.

applicable statute. The respondent submits th
in the absence of such an express provision app
cable to regionals "a presumption against its [t
sovereign's] suability" applies; "nor should
court enlarge its liability to suit" by inference
implication. *Eastern Transp. Co.* v. *Unit*
States, 272 U. S. 675, 686.

B. CONGRESS HAS NOT IMPLIEDLY SUBJECTED REGIONALS TO SU

The petitioner argues that Congressional inte
to subject regionals to suit is indicated by inco
poration of regionals by R. F. C. which is e
pressly subjected to suit; by formation of regio
als as corporations and by naming them corpor
tions; and by the nature of the business regional
were directed to transact. Even if Congressiona
intent to subject a governmental instrumentalit
to suit could ever be implied, which respondent
denies, such an implication is not supported b
the facts of this case.

1. The petitioner argues (Br. 8–12) that regio
als are subject to suit because Congress has au
thorized the R. F. C. to create them and has ex
pressly subjected the R. F. C. to suit (Act o
January 22, 1932, Sec. 4, c. 8, 47 Stat. 6, a
amended, U. S. C., Title 15, Sec. 604). For thi
argument the petitioner relies upon *Casper* v.
Regional Agricultural Credit Corp., 278 N. W. 896,
which states, at p. 901, that "it is hardly to be in-
ferred that immunity would be granted to the
creature where it is withheld from the creator."

The respondent contends that Regional, as a Government instrumentality, is immune from suit unless Congress has expressly provided otherwise and this immunity cannot be destroyed by the mere inference from the suability of R. F. C. Moreover, the fact that Congress authorized creation of regionals by R. F. C. instead of by the Farm Credit Administration or some other Government agency not subject to suit does not support such an inference, because there is no particular or special relation between the power of R. F. C. to create regionals and its power to sue and be sued. There is no more reason to infer that Congress intended that this attribute of suability should pass from R. F. C. to regionals than to infer that any of the other powers of R. F. C., such as its power to create regionals, passed to regionals. The attribute of suability is not an inheritable characteristic any more than the attribute whereby R. F. C. created regionals."[11]

The respondent's argument proves far too much because if it were applied to its logical extent it might be argued that the Farm Credit Administration is subject to suit in contract because the United States, its creator, is subject to suit in contract. But the Farm Credit Administration is clearly immune. *North Dakota-Montana Wheat Growers' Ass'n.* v. *United States*, 66 F. (2d) 573 (C. C. A. 8).

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[11] In the cases cited on page 11 of the petitioner's brief, the statutes under which the Government corporations were created contained specific provisions with respect to suit.

2. The petitioner argues (Br. 12–23, 28–35) that Regional is subject to suit because it was formed as a corporation and is named a corporation and because suability is inferred from the grant of corporate existence. The respondent submits that the corporate character was conferred to subserve the purposes of the Federal Government. *McCulloch* v. *Maryland*, 4 Wheat. 316, 411. Questions of substantive liabilities and immunities must be determined in the light of the governmental ends to be accomplished—not by the corporate form of the agency. The general rule that a grant of corporate existence implies liability to suit, applicable to private corporations engaged in private business not involving sovereign immunity from suit, has no application to corporate instrumentalities of the Federal Government which are immune from suit unless this sovereign immunity is abandoned by statute clearly and expressly and not by implication. The presumption of immunity from suit (*Eastern Transp. Co.* v. *United States*, 272 U. S. 675, 686) and the sovereign character of this immunity forbid the view that the mere corporate form of the Government instrumentality implies that Congress intended to subject it to suit.

The cases relied on by petitioner involving corporate instrumentalities of the Government held to be subject to suit are not in point, because in those cases the corporations were incorporated under statutes containing express provisions for suabil

ity (*Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549) or the Government was merely an incorporator or stockholder in a corporation formed under general laws giving the corporation power to sue and be sued (*United States Bank* v. *Planters' Bank*, 9 Wheat. 904).

In the *Sloan* case, *supra*, this Court stated at p. 565:

> The Shipping Act contemplated a corporation in which private persons might be stockholders and which was to be formed like any business corporation under the laws of the District, with capacity to sue and be sued. * * *

The Court stated at page 570:

> The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States. * * *

In *United States Bank* v. *Planters' Bank* this Court stated at p. 907:

> The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character.

In the present case, however, Congress did not direct creation of regionals under laws of incorporation of a State providing that corporations could

sue or be sued, but by a Federal statute containing no such direction authorized R. F. C. to create regionals. It is submitted that in these circumstances nothing indicates that Congress intended to waive the sovereign immunity from suit.

3. The petitioner argues (Br. 23–28) that the nature of the business Regional was directed to transact indicates that Congress intended it should be subject to suit. The respondent submits that nothing in the business which regionals were directed to transact and nothing in the present transaction indicates that Congress intended that regionals, engaged in a public and governmental activity, should be subject to suit.

a. The R. F. C. was authorized to create regionals empowered to make secured loans to farmers or stockmen for an agricultural purpose or for livestock (Section 201 (e) of the Act of July 21, 1932, *infra*, p. 25). The section immediately preceding, Section 201 (d) of that Act, entitled "An Act To relieve destitution, to broaden the lending powers of the Reconstruction Finance Corporation, and to create employment by providing for and expediting a public-works program," authorized the R. F. C. "to finance the carrying and orderly marketing of agricultural commodities and livestock produced in the United States." The "Cattle Feeding Contract" (R. 32–33) in the present case expressly recognized that the care of petitioner's cattle was undertaken by Regional "as an emergency relief measure * * *."

b. The petitioner's argument that, even in the absence of an expressed intent, the sovereign's intent to waive immunity from suit may be inferred from the type of activity involved, whether governmental or proprietary, may be applicable to instrumentalities of a state government, which may engage in activities commonly classified as governmental or proprietary for purposes of immunity from suit and other immunities. *State of North Dakota* v. *Olson*, 33 F. (2d) 848 (C. C. A. 8th); *Gross* v. *Kentucky Board of Managers*, 105 Ky. 840; cf. *Helvering* v. *Gerhardt*, 304 U. S. 405, 418; *Brush* v. *Commissioner*, 300 U. S. 352, 370–371; *Helvering* v. *Powers*, 293 U. S. 214; *South Carolina* v. *United States*, 199 U. S. 437.

Such an argument has no application, however, to instrumentalities of the Federal Government which engage only in governmental activities and activities incidental thereto. *Helvering* v. *Gerhardt*, 304 U. S. 405, 411; *New York ex rel Rogers* v. *Graves*, 299 U. S. 401, 408; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 211; *Osborn* v. *United States Bank*, 9 Wheat. 738. Therefore, the nature of the activities of a Federal instrumentality, being governmental in character, offers no basis for any inference that Congress intended them to be subject to suit.

c. *Federal Land Bank* v. *Priddy*, 295 U. S. 229, did not decide that the character of the activities of a Federal instrumentality might form the basis for a determination that Congress had intended it to be

subject to suit, even in the absence of an expr consent to suit. In that case the Court determin merely that, when Congress had given express p mission to sue Federal Land Banks, as fully natural persons, their creditors were by implic tion entitled to the remedies available against o dinary business corporations, including attac ments before judgment. In other words, th Court distinguished between the statutory right t sue a Federal instrumentality, and the remedie available to creditors and claimants in the exer cise of that right. In support of its position, th Court pointed to the National Banking Act, where in those institutions were specifically exempted from attachment and injunction before judgment. The Court's decision was qualified by the state ment that the record in the case under considera tion failed to show that the taking of the specific property levied upon would in any way interfere with the important governmental functions, which the bank was created to perform. The natural inference being, of course, that if a seizure under other conditions would interfere with the govern mental functions of the bank, the remedy would be denied to creditors and other claimants.

The respondent respectfully submits that where consent to suit is expressly granted the scope of that consent intended by Congress may be deter mined from all the circumstances, including the activities of the instrumentality, but where, in the present case, no consent whatever to sue has been expressly granted, the immunity from suit may not be destroyed by implication.

The respondent submits, therefore, that in the absence of an express consent to suit by Congress Regional as a Government instrumentality is immune from suit.

II

CONGRESS HAS NOT SUBJECTED REGIONAL TO SUIT IN TORT

Even if Regional is not in reality an incorporated bureau of the Government of the United States, and, like any other branch of the Government, immune from suit in the absence of Congressional consent, as respondent contends, there remains the question whether Regional, even though suable, is liable for torts committed by its officers, agents, or employees.

The Regional is a corporation wholly capitalized by the United States. A judgment against Regional would compel it to pay out a sum of money from the public funds in the Treasury of the United States. Such a judgment would have the same effect as if it were rendered directly against the United States for the amount specified. The jurisdiction of a court over such an action is governed by the same rule which determines the court's jurisdiction over a suit against the Government itself. *Smith* v. *Reeves,* 178 U. S. 436, 439.

The present case is an action for tort, and does not rest upon a contract, express or implied. An action will not lie against the United States for the misfeasance or nonfeasance of its officers or

agents. *Gibbons* v. *United States*, 8 Wall. 269, 27
Langford v. *United States*, 101 U. S. 341, 34
Schillinger v. *United States*, 155 U. S. 163, 16
Russell v. *United States*, 182 U. S. 516, 530; *Herl*
v. *United States*, 198 U. S. 229, 234; *Peabody*
United States, 231 U. S. 530, 539.

Similarly, when Congress provides for the estab
lishment of a government-owned corporation t
perform public and governmental functions, an
appropriates funds to be expended by the corpora
tion for stipulated governmental purposes, such
funds are not available for the payment of claim
arising out of the unlawful acts of officers or em-
ployees of the corporation. Even if Congress had
endowed this corporation with the capacity to
sue and be sued, it is not to be inferred that Con-
gress thereby waived the substantive immunity
from liability for torts. On the contrary, the stat-
utory liability to suit must be regarded as con-
fined to matters within the scope of the corporate
powers of the Government agency—not unauthor-
ized wrongs upon individuals. *Lyle* v. *National*
Home, 170 Fed. 842 (C. C. E. D. Tenn.); *Over-*
holser v. *National Home*, 68 Ohio St. 236. The rule
of the *National Home* cases has recently been ap-
plied to actions in tort against the Home Owners'
Loan Corporation, in the following cases: *Henson* v.
Eichorn, 24 F. Supp. 842 (E. D. Ill.); *Prato* v.
Home Owners' Loan Corporation, 24 F. Supp. 844
(D. C. Mass.); *contra*, *Herman* v. *Home Owners'*
Loan Corporation, 120 N. J. L. 437; *Pennel* v. *Home*

Owners' Loan Corporation, 21 F. Supp. 497 (D. Me.). The rule has also been applied to the Tennessee Valley Authority, a corporation expressly empowered to sue and be sued. *Posey* v. *Tennessee Valley Authority*, 93 F. (2d) 726 (C. C. A. 5th).

In England it is settled law that corporations established by the Government for governmental purposes, deriving their funds entirely from the Government, are "servants of the Crown," and "that the presence or absence of incorporation made no difference to the proposition that the heads of Government departments are not responsible for the [tortious] acts of subordinates." *Roper* v. *The Commissioners of His Majesty's Works and Public Buildings* [1915], 1 K. B. 45, 52.

In this country, state courts have repeatedly held that the legislature does not consent to actions in tort against a state governmental corporation, merely by conferring upon the corporation the power to sue and be sued. *White* v. *Alabama Insane Hospital*, 138 Ala. 479 (1903); *Leavell* v. *Western Kentucky Asylum*, 122 Ky. 213 (1906); *Maia's Adm.* v. *Eastern State Hospital*, 97 Va. 507 (1899); *Smith* v. *State of New York*, 227 N. Y. 405 (1920); *Yolo* v. *Modesto Irr. Dist.*, 216 Cal. 274 (1932); *Bush* v. *Highway Commission*, 329 Mo. 843 (1932); and other cases.

It is submitted that even if it can be inferred that Congress intended to permit the Regional to be sued, such permission would merely give a remedy for a claim of the type which may lawfully be

enforced against the United States, and would no create a substantive liability for the tortious act of employees.

CONCLUSION

We respectfully submit that the courts below were correct in holding that Regional is a governmental instrumentality in respect of which Congress has not waived immunity from suit, and in any event has not consented that Regional be sued in tort. The judgment of the court below, therefore, should be affirmed.

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JANUARY 1939.

APPENDIX

The Act of July 21, 1932, Section 201, c. 520, 47 Stat. 709, 713, provides in part as follows:

(e) The Reconstruction Finance Corporation is further authorized to create in any of the twelve Federal land-bank districts where it may deem the same to be desirable a regional agricultural credit corporation with a paid-up capital of not less than $3,000,000, to be subscribed for by the Reconstruction Finance Corporation and paid for out of the unexpended balance of the amounts allocated and made available to the Secretary of Agriculture under section 2 of the Reconstruction Finance Corporation Act. Such corporations shall be managed by officers and agents to be appointed by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe. Such corporations are hereby authorized and empowered to make loans or advances to farmers and stockmen, the proceeds of which are to be used for an agricultural purpose (including crop production), or for the raising, breeding, fattening, or marketing of livestock, to charge such rates of interest or discount thereon as in their judgment are fair and equitable, subject to the approval of the Reconstruction Finance Corporation, and to rediscount with the Reconstruction Finance Corporation and the various Federal reserve banks and Federal intermediate credit banks any paper that they acquire which is eligible for such purpose. All expenses incurred in

connection with the operation of such corporations shall be supervised and paid by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe.

Executive Order No. 6084, dated March 27, 1933, effective May 27, 1933, provides in part:

* * * * *

(5) There are transferred to the jurisdiction and control of the Farm Credit Administration:

* * * * *

(e) The functions of the Reconstruction Finance Corporation and its board of directors relating to the appointment of officers and agents to manage regional agricultural credit corporations formed under section 201 (e) of the Emergency Relief and Construction Act of 1932; relating to the establishment of rules and regulations for such management; and relating to the approval of loans and advances made by such corporations and of the terms and conditions thereof.

RECONSTRUCTION FINANCE CORPORATION,
Washington, May 25, 1933.

REGIONAL AGRICULTURAL CREDIT CORPORATION
BULLETIN No. 60

Subject: TRANSFER OF JURISDICTION AND CONTROL TO FARM CREDIT ADMINISTRATION

To All Regional Agricultural Credit Corporations:

Under the Executive Order issued by the President on March 27, 1933, there is transferred to the

jurisdiction and control of the Farm Credit Administration: The functions of the Reconstruction Finance Corporation and its board of directors relating to the appointment of officers and agents to manage regional agricultural credit corporations formed under section 201 (e) of the Emergency Relief and Construction Act of 1932; relating to the establishment of rules and regulations for such management; and relating to the approval of loans and advances made by such corporations and of the terms and conditions thereof.

The Executive Order above referred to will become effective on May 27, 1933. Thereafter all communications with respect to the operations of the regional agricultural credit corporations (except as stated in Mr. Brennan's circular letter of May 23, 1933, and Mr. Reed's circular letter of May 24, 1933) should be addressed to George M. Brennan, Farm Credit Administration, Washington, D. C. Until you are otherwise advised the rules and regulations heretofore prescribed by the Directors of the Reconstruction Finance Corporation for the management and operation of the regional agricultural credit corporations remain in full force and effect, with the exception that all action heretofore requiring the approval of the Reconstruction Finance Corporation or the Directors thereof will require the approval of the Farm Credit Administration by the Governor thereof, or by such other person or persons as may be designated by him for the purpose.

By Order of the Directors of the Reconstruction Finance Corporation.

/s/ L. P. Bethea,
(L. P. Bethea,)
Acting Secretary.

Approved:
/s/ H. Morgenthau, Jr.,
(Henry Morgenthau, Jr.,)
Governor, Farm Credit Administration.

Reconstruction Finance Corporation,
Washington, October 1, 1933.

[Excerpts]

Regional Agricultural Credit Corporation
Bulletin No. 1

Confidential, Not For Publication.
Subject: General Instructions.

To All Regional Agricultural Credit Corporations and Branches:

* * * * *

3. Personnel.

Members of the boards of directors and of the branch committees, and all officers and employees of the regional agricultural credit corporations, shall be appointed by the Reconstruction Finance Corporation. Recommendations for employment should be submitted to the Reconstruction Finance Corporation accompanied by Personal History and

Service Record cards (Form S1). The compensation of all officers and employees must be reduced, through furlough or otherwise, in accordance with the terms of Part II, Title I of the Legislation Appropriation Act, approved June 30, 1932, concerning which more detailed advice will be furnished shortly.

4. OPERATING PROCEDURE.

The provision of capital funds; the establishment of accounts with the Treasurer of the United States; the payment of salaries and expenses, as well as accounting procedure to be adopted, and the form of reports to be made to the Reconstruction Finance Corporation will be discussed in future bulletins.

* * * * *

9. LENDING POLICIES.

Undue competition on the part of regional agricultural credit corporations with existing agencies, both governmental and private, engaged in similar financing, would tend to create an undesirable condition. This is particularly true since the regional agricultural credit corporations are of a more or less temporary character. It is intended that the regional agricultural credit corporations be, as far as possible, non-competitive with other governmental agencies and private concerns engaged in financing of a similar character. Accordingly, the following policy should be carefully observed:

An applicant whose legitimate credit needs are being met by an existing agency, whether governmental or private, should be discour-

aged from transferring his credit relationship to a regional agricultural credit corporation where such agency is willing and able to continue to finance applicant on an adequate basis and at reasonable rates of interest. However, where such agency requires the borrowers from it to pay bonus charges or to purchase capital stock, this fact may be considered a justifiable reason for a desire to transfer the relationship.

* * * * *

16. LIVESTOCK INSPECTORS.

The originals of the above forms should at all times be on file with the regional agricultural credit corporation; and copies of same should be forwarded to the Reconstruction Finance Corporation with the recommendation of the regional agricultural credit corporation as to the employment of the applicant as a livestock inspector. Information as to an inspector need not be limited to that called for by the above forms, and any additional information which the regional agricultural credit corporation may have as to the qualifications of the applicant should likewise accompany the report forms.

* * * * *

20. CONFIDENTIAL RELATIONSHIP.

Attention is directed to the fact that the business of the regional agricultural credit corporations and of the applicants must be regarded as strictly confidential by all members of the Boards of Directors and Branch Committees and by all officers and employees of the regional agricultural credit corpora-

tions. Employees of the regional credit corporations should be cautioned that violation of the above instructions may be occasion for dismissal. In no case should press statements be issued regarding particular applications received, approved or disapproved.

21. The Act contemplates that the Reconstruction Finance Corporation shall establish rules and regulations under which the regional agricultural credit corporations will conduct their operations. For the present, the regional agricultural credit corporations will be advised of such rules and regulations (as well as of other pertinent matters) through the issue of bulletins. Statements in this and subsequent bulletins, relative to policies and procedure, are to be considered as rules and regulations so promulgated.

/s/ G. R. COOKSEY,
Secretary.

[Excerpt]

RACC BULLETIN NO. 5, DATED OCTOBER 17, 1932
Subject: EXPENSES OF REGIONAL AGRICULTURAL CREDIT CORPORATION

* * * * *

(8) *Telegrams.*—Official telegrams may be sent either "Paid" or "Collect," and should be endorsed "official business, regional agricultural credit corporation of _____ (location), government rate."

* * * * *

RECONSTRUCTION FINANCE CORPORATION,
Washington, October 19, 1932.

REGIONAL AGRICULTURAL CREDIT CORPORATION
BULLETIN No. 7

Confidential, Not For Publication.
Subject: OATH OF OFFICE.

To All Regional Agricultural Credit Corporations:

All directors, members of Branch Committees, officers and employees of the regional agricultural credit corporations (principal offices and branches) will subscribe to an oath of office on Standard Form No. 8. A supply of such forms will be sent to the secretary of each corporation today.

When properly signed and acknowledged, the oaths of office should be delivered to the secretaries of the respective regional agricultural credit corporations. It will be the duty of the secretary of each regional agricultural credit corporation to see that properly subscribed oaths of office are delivered to him, and he will be responsible for their safe keeping.

By direction of the Board of Directors.

/s/ G. R. COOKSEY,
(G. R. Cooksey),
Secretary.

* * * * *

Standard Form No. 8
(Approved by the President, May 22, 1925)

OATH OF OFFICE

Prescribed by Section 1757, Revised Statutes of the United States.

(Department or Establishment) (Bureau or Office)

I, _____, do
(Name in full, printed or typed)
solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. SO HELP ME GOD.

_____
(Signature of Appointee)

RECONSTRUCTION FINANCE CORPORATION,
Washington, November 3, 1932.

REGIONAL AGRICULTURAL CREDIT CORPORATION
BULLETIN No. 10

Confidential, Not For Publication.

Subject: USE OF FRANKED ENVELOPES.

To All Regional Agricultural Credit Corporations:

As you have been previously advised, it has been decided that the regional agricultural credit corporations are entitled to the use of the franking privilege. Every precaution must be taken to insure that improper use is not made of the franking privilege and that the use of franked envelopes is at all times restricted to official business.

Franked envelopes may be used only by the regional agricultural credit corporations (principal and branch offices) for customary business purposes. Such envelopes may be used by paid em-

ployees in submitting reports from the field to their offices, but may not be used by members of boards of directors or branch committees in their capacity as such members.

It is appreciated that in such instances directors and members of branch committees may be called upon to forward to the principal or branch office inquiries and requests for application forms in connection with which it would appear in order that such members be reimbursed for actual postage required for the purpose.

(Signed) FORD E. HOVEY,
Chief, Agricultural Credit Division.

FARM CREDIT ADMINISTRATION,
Washington, D. C., November 1, 1934.

RACC 200

Subject: FILING OF CAPITAL STOCK TAX RETURN.

To All Regional Agricultural Credit Corporations:

1. The Commissioner of Internal Revenue has ruled that Regional Agricultural Credit Corporations are exempt from the capital stock tax imposed by Section 701 of the Revenue Act of 1934 (U. S.) by virtue of Section 101 (15) of such Act.

2. In connection with this ruling, there is quoted below for your information and guidance the relevant paragraphs of a letter which we have recently received from the Deputy Commissioner of Internal Revenue requesting that the Regional Agricultural Credit Corporations, though exempt, file initial capital stock tax returns in order to establish their exemptions.

TREASURY DEPARTMENT,
Washington, October 18, 1934.

FARM CREDIT ADMINISTRATION,
Washington, D. C.

Attention: Scott W. Hovey, General Counsel.

GENTLEMEN: In your communication of October 13, 1934, you request information as to whether the regional agricultural credit corporations created under section 201 (e) of the Emergency Relief and Construction Act of 1932, which are now being administered by the Farm Credit Administration under and by virtue of an Executive Order of the President of the United States, are subject to the capital stock tax for the taxable year ended June 30, 1934, and as to whether such corporations are required to file capital stock tax returns for the taxable year ended June 30, 1934.

You are advised that it would appear that the agricultural credit corporations created under section 201 (e) of the Emergency Relief and Construction Act of 1932 are "instrumentalities of the United States" and would, therefore, be exempt from the capital-stock tax under the provisions of section 101 (15) of the Revenue Act of 1934. It appears, therefore, that the procedure most convenient to both the corporations created and organized under section 201 (e) of the Emergency Relief and Construction Act of 1932, and the Bureau, is for the corporations to file initial Forms 707 for the taxable year ended June 30, 1934, so completed as to constitute formal claims for exemption. To do this the corporations need only complete Items 1 to 6, inclusive, and Items 8 and 9 on the first page and (A) (1) on the second

page of Form 707, revised 1934. Statements should be attached to the forms showing that the corporations submitting them are in fact "instrumentalities of the United States." After this right to exemption is once established, the corporations need not thereafter make capital-stock tax returns or furnish any further proof with respect to their status under the law.

Respectfully,

(Signed) D. S. BLISS,
Deputy Commissioner.

3. Section 701 of the Revenue Act provides: That for each year ending June 30, beginning with the year ending June 30, 1934, every domestic corporation shall make a return, under oath, within one month after the close of the year, with respect to which such tax is imposed, to the Collector for the District in which is located its principal place of business. Such return shall contain such information and be made in such manner as the Commissioner, with the approval of the Secretary, may, by regulation, prescribe (Subsections (a) and (d)); the taxes imposed by Section 701 do not apply to any corporation enumerated in Section 101 (Subsection (c)).

4. It is suggested that, when filing their initial capital stock tax returns with their respective internal revenue collectors, each of the regional agricultural credit corporations inclose a copy of the above quoted letter in order to establish their exemption from the capital stock tax.

5. In view of the provisions in Section 701 of the Revenue Act, referred to in paragraph 3, above, it is suggested that, as soon as possible, a copy of the

blank form on which the initial capital stock tax return is required to be made, be obtained from the Internal Revenue Collector for the district in which the principal office of such corporation is located, and executed and filed with such Collector by the executive vice-president or officer in charge of the principal office of each corporation (branch offices not being required to file any return in this connection).

A. T. ESGATE,
Acting Director,
Regional Agricultural Credit Division.

11-1-34
1365

FARM CREDIT ADMINISTRATION
Washington, D. C., February 24, 1936.

To All: *General Agents and General Counsel*	GA	332
Federal Land Banks	FLB	1032
Federal Intermediate Credit Banks	FICB	484
Production Credit Corporations	PCC	306
Banks for Cooperatives	BC	315
Regional Agricultural Credit Corporations	RACC	282

Subject: FEES TO UNITED STATES MARSHALS AND CLERKS OF UNITED STATES DISTRICT COURTS—WHEN PAYABLE BY CORPORATIONS OF FARM CREDIT SYSTEM.

1. We recently learned of a ruling issued by the Department of Justice with respect to the payment

of clerks' and marshals' fees for services rendered at the instance of certain Government corporations or in their behalf. This ruling is contained in the Department's Circular No. 2609 (revised), addressed to United States marshals and clerks of United States district courts, under date of November 12, 1934. A copy of this circular is attached hereto.

2. Upon learning of this circular, we addressed an inquiry to the Department of Justice respecting its applicability to the various corporations of the farm credit system. We are now in receipt of a reply, dated January 31, 1936, a copy of which is attached hereto.

3. You will note from these attachments that Department of Justice Circular No. 2609 (revised) is applicable to all corporations of the farm credit system whose stock is wholly owned by the United States, but that the other corporations under the supervision of the Farm Credit Administration will be required to pay the fees in question.

PEYTON R. EVANS,
General Counsel.

2-24-36
1990

Attachments

[Copy]

DEPARTMENT OF JUSTICE,
Washington, D. C., January 31, 1936.

PEYTON R. EVANS, ESQ.,
General Counsel, Farm Credit Administration, Washington, D. C.

SIR: In reply to your letter of January 14, 1936, concerning fees payable to United States marshals

and clerks of United States district courts for services on behalf of corporations under the supervision of the Farm Credit Administration, you are informed that it has been determined that the Federal Land Banks should be required to pay the fees claimed by these officials from private litigants. In other words, Federal Land Banks are not regarded as "other similar corporations" within the meaning of Department Circular 2609, Revised. The same conclusion must necessarily follow with regard to Banks for Cooperatives, Production Credit Associations and National Farm Loan Associations.

It has been concluded that the other corporations mentioned in your letter do come within the meaning of "other similar corporations" in said circular, namely, the Federal Farm Mortgage Corporation, Federal Intermediate Credit Banks, Production Credit Corporations, and the Regional Agricultural Credit Corporations.

With regard to the certificate referred to in the second paragraph of the circular, it would seem that the certification proposed by you, namely: "----------, General Counsel, by ----------, District General Counsel of the Farm Credit Administration," will satisfy the requirements of the circular.

Respectfully,

(Signed) C. E. STEWART,
Administrative Assistant
to the Attorney General.

[Copy]

DEPARTMENT OF JUSTICE,
Washington, D. C., November 12, 1934.

CIRCULAR No. 2609 (REVISED)

To United States Marshals and Clerks of United States District Courts:

Reference is made to suits which have been instituted in the United States district courts, to which the Reconstruction Finance Corporation, the Home Owners' Loan Corporation, the Tennessee Valley Authority, and other similar corporations are parties.

It is the view of the Department that in all suits filed or defended by such corporations, the clerks' and marshals' fees for services rendered at their instance or in their behalf, should be treated as constructive earnings from the United States, provided, that upon the termination of cases to which the Reconstruction Finance Corporation is a party, said corporation will also be billed by the clerk for the clerk's and marshal's *fees,* which will either be paid or, in lieu thereof, there will be filed with the clerk a certificate of the General Counsel or Treasurer of the corporation,[1] to the effect that the Corporation has not been reimbursed by the primary obligor covering such fees and that it had no reimbursable contract, or, if it did have a reimbursable contract, that it was unable to recover on same and in such event no fees should be paid by the corporation.

---

[1] See letter dated January 31, 1936, from Department of Justice (third paragraph) for method of executing certificate, in cases involving Federal Farm Mortgage Corporation.

However, the *expenses* incurred by marshals in connection with the service of process, or otherwise, in behalf of such corporations, should be charged to and collected from them and handled in the same manner as are expenses collected from private litigants.

Respectfully,

WILLIAM STANLEY,
The Assistant to the Attorney General.

FARM CREDIT ADMINISTRATION,
Washington, D. C., September 29, 1936.

RACC 321

Subject: APPLICATION OF STAMP TAXES UNDER TITLE VIII OF THE REVENUE ACT OF 1926, AS AMENDED, WITH RESPECT TO TRANSACTIONS INVOLVING EXEMPT FEDERAL GOVERNMENTAL AGENCIES.

To All Regional Agricultural Credit Corporations:

1. Several instances have come to our attention where difficulty has been experienced with officials whose duty it is to record conveyances of real estate. Notwithstanding the fact that the Bureau of Internal Revenue has ruled that tax exempt corporations operating under the supervision of the Farm Credit Administration are not liable for the tax, and that the tax in question cannot be assessed against them, the recording officials have in some instances withheld recordation when unstamped instruments were offered for record.

2. As a result of conferences with the Bureau of Internal Revenue, instructions have now been issued to the collectors of internal revenue through-

out the country. Attached hereto is a copy of a circular letter dated September 1, 1936, signed by the Commissioner of Internal Revenue, embodying the Bureau's instructions.

3. Your particular attention is invited to the next to the last paragraph of the circular, containing the statement that there is no existing Federal statute under the provisions of which the recording of unstamped instruments would be contrary to law.

4. It is suggested that in the future where difficulty with recording officials is experienced, they be referred to the collector of internal revenue for the district, who will presumably advise in accordance with the terms of the circular letter.

PEYTON R. EVANS,
General Counsel.

9-29-36
2239

Attachment.

[Copy]

MT: ST—Mimeograph
Coll. No. 4497

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C., September 1, 1936.

APPLICATION OF STAMP TAXES UNDER TITLE VIII OF THE REVENUE ACT OF 1926, AS AMENDED, WITH RESPECT TO TRANSACTION INVOLVING EXEMPT FEDERAL GOVERNMENTAL AGENCIES

Collectors of Internal Revenue and Others Concerned:

Questions have been presented relative to the application of the stamp taxes imposed under Title VIII of the Revenue Act of 1926, as amended,

where one of the parties to the transaction involved is the Reconstruction Finance Corporation, a Federal land bank, or some other governmental agency which is specifically exempted from the tax.

Section 800 of the Revenue Act of 1926 imposes a liability to the stamp tax upon any person who makes, signs, issues, sells, removes, consigns or ships the several instruments described in Schedule A of Title VIII, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned or shipped, and, except as therein or otherwise exempted, either party to any of the transactions involved is subject to the tax. The fact that a Federal agency, specifically exempted from the tax might be a party to the transactions does not relieve the other parties to the transactions from liability for the payment of the taxes, unless such parties are agencies or instrumentalities of a State or the United States or are otherwise not subject to the tax.

Where a non-exempt party to a transaction involving a taxable instrument is unable or unwilling to pay the tax due, the transaction, nevertheless, is subject to the tax, and if the Federal governmental agency in such a case pays the tax, such payment is to be regarded as a payment on behalf of the taxable party. Collectors should not, however, make any attempt to effect direct collection of such taxes from the Federal governmental agencies. In any case where it is found that the stamp tax due on such a transaction has not been paid, collection of the tax should be made from the other parties to the transactions who are liable.

In any transaction involving the conveyance of realty, the instrument of conveyance is subject to

tax, and the question of whether or not the deed of conveyance may be delivered to the purchaser without having affixed thereto stamps denoting payment of the tax, is governed by the law of the local jurisdiction. In the case of a sale under foreclosure where the purchaser is an exempted Federal agency, the mortgagor is liable for the tax. In such a case, if the mortgagor does not voluntarily affix the stamps, the sheriff, or other person making the sale, should affix the required stamps on behalf of the mortgagor and include the cost thereof as a necessary expense of the sale; or where a conveyance is made by a defaulting mortgagor to an exempted Federal agency as mortgagee, the required stamps must be affixed to the deed of conveyance by the mortgagor.

The question of whether unstamped deeds of conveyance may be received by State recording officers for the purpose of recordation, is likewise governed by the law of the local jurisdiction. There is no existing Federal statute under the provisions of which the recording of unstamped deeds would be contrary to the law. The Bureau endeavors to secure the cooperation of State recorders in assisting the Federal Government to collect any revenue to which it may be justly entitled, and requests such recorders to advise the collectors of internal revenue in all cases where deeds are presented for recordation without having the proper stamps affixed thereto.

Correspondence in regard to the instructions set forth herein should refer to the number of this mimeograph and to the symbols MT: ST.

GUY T. HELVERING,
Commissioner.

FARM CREDIT ADMINISTRATION,
Washington, D. C., February 6, 1936.
RACC 279

Subject: EXEMPTION OF REGIONAL AGRICULTURAL CREDIT CORPORATIONS FROM TAXATION BY STATES AND LOCAL AUTHORITIES

To All Regional Agricultural Credit Corporations:

1. There is attached a copy of a memorandum embodying an opinion recently rendered to one of the regional agricultural credit corporations.

2. It will be observed that the conclusion reached is to the effect that the regional agricultural credit corporations are exempt from all manner of taxation by state, municipal, and local authorities.

PEYTON R. EVANS,
General Counsel.

2-6-36
1982

Attachment.

OCTOBER 19, 1932.

[Excerpts]

REGIONAL AGRICULTURAL CREDIT CORPORATION
BULLETIN No. 8

Confidential, Not for Publication.
Subject: ACCOUNTING SYSTEM.
To All Regional Agricultural Credit Corporations:

* * * * *

Pay Voucher for Personal Services.—This form will be supplied by the Reconstruction Finance Corporation (R. A. C. C. Form #4) and is to be prepared in duplicate.

Travel Voucher.—This form will be supplied by the Reconstruction Finance Corporation (R. A. C. C. Form #5) and is to be prepared in duplicate.

Voucher for Purchases and Services Other Than Personal.—This form will be supplied by the Reconstruction Finance Corporation (R. A. C. C. Form #6) and is to be prepared in duplicate.

* * * * *

Deposit Ticket.—Form #6599 furnished by the Treasury Department to be prepared in quadruplicate and distributed as follows:

Original, Dupicate, and Triplicate to bank with deposit.

Duplicate to be signed and returned by the receiving bank and filed by the principal office.

Quadruplicate to Chief Auditor at Washington.

Daily Cash Letter.—This form should reflect the A. B. A. number and amount of each check attached and forwarded to the Federal Reserve Bank with the deposit ticket. A copy of this letter should be retained in the files of the principal office.

* * * * *

Cash Receipts.—All checks received should be deposited promptly each day by the Principal office and each Branch office with the Federal Reserve Bank or Branch serving the territory in which are located the banks upon which the checks are drawn. Several deposits may be required each day, separate deposit tickets and daily cash letters being prepared for each deposit.

* * * * *

Depositary will date and sign this and send it to the Treasurer U. S., with daily transcript of same date

CERTIFICATE OF DEPOSIT FOR CHECKING ACCOUNT

_____ Deposit No. _____
(Address of depositor and date sent) (To be filled in by depositor)

_____, _____
(Name of depositor) (Title)

has deposited with _____, _____
(Name of depositary bank, or U. S. Treasurer's Office) (Place)

_____ Dollars

For Credit, subject to check, in the _____ disbursing account of

_____ Symbol No. _____
(Name of officer to be credited)

$

_____
(Address)

_____

I certify that the above amount has been received and credited in the account of the Treasurer of the U. S.

_____
(Date credited)

_____
Cashier.

U. S. Government Printing Office 2–17038

47

Regional Agricultural Credit Corporation of Sioux City, Iowa 155,691

Omaha, Nebraska, _____

5 TREASURER OF THE UNITED STATES 15-51

Treas. Seal | Pay to the Order of_____ $_____

The Sum Of_____Dollars

Object for which drawn:

Vo. No.

Countersigned

_____ 93-354

FORM APPROVED BY COMPTROLLER OF THE TREASURY

January 27, 1913.

This check must be indorsed in ink or indelible pencil on the line below by the person in whose favor it is drawn, and the name must be spelled exactly the same as it is on the face of the check.

If indorsement is made by mark (X) it must be witnessed by two persons who can write, giving their place of residence in full.

_____

(Sign on this line.)

RECONSTRUCTION FINANCE CORPORATION,

Washington, April 28, 1933.

Regional Agricultural Credit Corporation Bulletin No. 51.

Confidential, Not for Publication.

Subject: DEPOSITS IN ACCOUNT OF RECONSTRUCTION FINANCE CORPORATION (Symbol 93-300).

To All Regional Agricultural Credit Corporations:

Funds for deposit in the account of the Reconstruction Finance Corporation with the Treasurer

of the United States (Symbol 93–300) should be remitted to Federal Reserve Banks or Branches addressed as follows:

Federal Reserve Bank of _____,
Custodian, Reconstruction Finance Corporation, _____, _____.
(City) (State)

or:

_____ Branch,
Federal Reserve Bank of _____,
Custodian, Reconstruction Finance Corporation, _____, _____.
(City) (State)

In some instances Custodian Banks and the Treasurer's Office have been unable to readily identify items other than repayments on rediscounted notes remitted for deposit in this Corporation's account. Certificates of deposit covering such remittances should be accompanied by a letter of transmittal or a memorandum giving sufficient information with respect to each item to enable the Custodian Bank to properly identify and allocate the collection in its daily report to the Treasurer of the Reconstruction Finance Corporation.

FORD E. HOVEY,
Chief, Agricultural Credit Division.

SEPTEMBER 30, 1937.

(Excerpts)

FARM CREDIT ADMINISTRATION ORDER NO. 202

Subject: CONSOLIDATION OF REGIONAL AGRICULTURAL CREDIT CORPORATIONS OF ALBANY, NEW YORK; BALTIMORE, MARYLAND; RALEIGH, NORTH CAROLINA; COLUMBUS, OHIO; JACKSON, MISSISSIPPI; AND ST. LOUIS, MISSOURI; GRANT OF CHARTER TO REGIONAL AGRICULTURAL CREDIT CORPORATION OF WASHINGTON, D. C.

WHEREAS, authority is vested in the Farm Credit Administration by the Farm Credit Act of 1937 to order and effect the consolidation of two or more regional agricultural credit corporations on such terms and conditions as it shall direct and to grant charters to, prescribe by-laws for, and fix the capital of regional agricultural credit corporations which may be formed by such consolidations; and

WHEREAS I, as Governor of the Farm Credit Administration, have found that the consolidation of the following named regional agricultural credit corporations (hereinafter called the "constituent corporations")

Regional Agricultural Credit Corporation of Albany, Albany, New York.

Regional Agricultural Credit Corporation of Baltimore, Baltimore, Maryland.

Regional Agricultural Credit Corporation of Raleigh, Raleigh, N. Carolina.

Regional Agricultural Credit Corporation of Columbus, Columbus, Ohio.

Regional Agricultural Credit Corporation of Jackson, Jackson, Mississippi.
Regional Agricultural Credit Corporation of St. Louis, St. Louis, Missouri.

into one corporation will effect a more efficient and economical administration of the business heretofore conducted by such constituent corporations,

NOW, THEREFORE, it is hereby ordered:

1. That the constituent corporations be and they hereby are consolidated into one corporation to be known as the "Regional Agricultural Credit Corporation of Washington, D. C.," which shall have all the rights, powers, authority and exemptions, shall be subject to the same supervision and control, and shall have its expenses paid in the same manner as provided by law in respect to the constituent corporations.

2. That there be and hereby is granted to the Regional Agricultural Credit Corporation of Washington, D. C., the following charter:---------

* * * * *

W. I. MYERS,
Governor, Farm Credit Administration.

INSTANCES WHERE CONGRESS HAS AUTHORIZED SUIT AGAINST GOVERNMENT CORPORATIONS

National Banks (c. 106, 13 Stat. 99, 101).

* * * sue and be sued, complain and defend, in any court of law and equity as fully as natural persons; * * *

Federal Deposit Ins. Corp. (c. 89, 48 Stat. 162, 172).

To sue and be sued, complain and defend, in any court of law or equity, State or Federal.

Federal Reserve Banks (c. 6, 38 Stat. 251, 254).

> To sue and be sued, complain and defend, in any court of law or equity.

Foreign Banking Corporations (c. 18, 41 Stat. 378, 379).

> * * * to sue and be sued, complain, and defend in any court of law or equity; * * *

Federal Land Banks (c. 245, 39 Stat. 360, 363).

> To sue and be sued, complain, interplead, and defend, in any court of law or equity, as fully as natural persons.

National Farm Loan Associations (c. 245, 39 Stat. 360, 365).

> (Articles of Association) may contain any other provision, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs.

Joint Stock Land Banks (c. 245, 39 Stat. 360, 374).

> * * * shall have the powers of, and be subject to all the restrictions and conditions imposed on, Federal Land banks by this Act * * *.

Federal Farm Mortgage Corporations (c. 7, 48 Stat. 344, 345).

> * * * shall have power to sue and be sued in any court, * * *

Federal Intermediate Credit Banks (c. 252, 42 Stat. 1454, 1455).

> * * * shall have power to sue and be sued both in law and equity, * * *.

Production Credit Corporation, Production Credit Association, Central Bank for Cooperatives, Regional Bank for Cooperatives (c. 98, 48 Stat. 257, 266).

> * * * shall have power to sue and be sued in any court, * * *.

National Agricultural Credit Corps. (c. 252, 42 Stat. 1454, 1462).

> To sue and be sued, complain and defend in any court of law or equity, * * *.

Federal Home Loan Bank (c. 522, 47 Stat. 725, 735).

> * * * to sue and be sued, to complain, and to defend, in any court of competent jurisdiction, State or Federal; * * *.

Home Owners' Loan Corporation (c. 64, 48 Stat. 128, 129).

> * * * which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, * * *.

Federal Housing Administrator (c. 614, 49 Stat. 684, 722).

> "* * * to sue and be sued in any court of competent jurisdiction, State or Federal."

National Mortgage Associations (c. 847, 48 Stat. 1246, 1253).

> To sue and be sued, complain and defend, in any court of law or equity, State or Federal.

Federal Savings & Loan Ins. Corporation (c. 847, 48 Stat. 1246, 1256).

To sue and be sued, complain and defend, in any court of law or equity, State or Federal.

Federal Credit Union (c. 750, 48 Stat. 1216, 1218).

To sue and be sued.

Corporation of Foreign Security Holders (c. 38, 48 Stat. 74, 93).

* * * to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; * * *.

China Trade Act Corporation (c. 346, 42 Stat. 849, 851).

(c) May sue and be sued;

War Finance Corporation (c. 45, 40 Stat. 506, 507).

* * * to sue and be sued; to complain and defend in any court of competent jurisdiction, State or Federal; * * *.

Textile Foundation (c. 440, 46 Stat. 539, 540).

(b) May sue and be sued; * * *.

Reconstruction Finance Corp. (c. 8, 47 Stat. 5, 6).

* * * to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; * * *.

Tennessee Valley Authority (c. 32, 48 Stat. 58, 60).

(b) May sue and be sued in its corporate name.

The National Asylum for Disabled Volunteer Soldiers (c. 21, 14 Stat. 10).

* * * to sue and be sued in courts of law and equity; * * *.

National Trade Union (c. 567, 24 Stat. 86).

* * * to sue and be sued, to implead and be impleaded, * * *.

The American National Red Cross (c. 23, 33 Stat. 599, 600).

* * * to sue and be sued in courts of law and equity within the jurisdiction of the United States; * * *.

Boy Scouts of America (c. 148, 39 Stat. 227).

* * * to sue and be sued in courts of law and equity within the jurisdiction of the United States; * * *.

The American Legion (c. 59, 41 Stat. 284, 285).

* * * to sue and be sued in courts of law and equity; * * *.

Belleau Wood Memorial Association (c. 228, 42 Stat. 1441).

(b) may sue and be sued;

The Grand Army of the Republic (c. 242, 43 Stat. 358, 359).

* * * capable of suing and being sued, * * *.

The United States Blind Veterans of the World War (c. 296, 43 Stat. 535, 536).

* * * to sue and be sued in courts of law and equity; * * *.

Disabled American Veterans of the World War (c. 268, 47 Stat. 320, 321).

* * * to sue and be sued in courts of law and equity; * * *.

American War Mothers (c. 303, 43 Stat. 966, 967)
* * * to sue and be sued in courts
law and equity; * * *.

Inland Waterways Corporation (c. 243, 43 Sta
360, 362).

(b) May sue and be sued in its corporat
name;

INSTANCES WHERE SUIT HAS NOT BEEN AUTHORIZED

Regional Agricultural Credit Corp. (c. 520, 47 Sta
709, 713).

(No authority to sue or be sued.)

Federal Savings & Loan Associations (c. 64, 4
Stat. 128, 132–134; c. 168).

(No authority to sue or be sued.)

Smithsonian Institution (c. 178, 9 Stat. 102; c.
17 Stat. 1; c. 69, 19 Stat. 240, 253; c. 36, 28 Sta
41).

(No authority to sue or be sued.)

*Board of Trustees of the National Training Scho
for Boys* (c. 90, 19 Stat. 49).

(No authority to sue or be sued.)

*Board of Trustees of the National Training Scho
for Girls* (c. 595, 25 Stat. 245, 246).

(No authority to sue or be sued.)

*The Columbia Institution for the Instruction o
the Deaf and Dumb, and the Blind* (c. 46, 11 Sta
161).

(No authority to sue or be sued.)

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SUPREME COURT OF THE UNITED STATES.

No. 364.—October Term, 1938.

Keifer and Keifer, a Co-partnership, composed of J. Warren Keifer, Jr., and Oswin Keifer, Petitioner,
vs.
Reconstruction Finance Corporation and Regional Agricultural Credit Corporation of Sioux City, Iowa.

On Writ of Certiorari from the United States Circuit Court of Appeals for the Eighth Circuit.

[February 27, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The Court took this case for review because an important question of federal law called for settlement, particularly in view of a conflict between the court below and the Supreme Court of Minnesota. *Casper* v. *Regional Agricultural Credit Corporation*, 202 Minn. 433. The question is whether a Regional Agricultural Credit Corporation, in the circumstances presently to be stated, is immune from suit.

On July 21, 1932, Congress enlarged the powers of the Reconstruction Finance Corporation (hereafter called "Reconstruction") established early that year, Act of January 22, 1932, c. 8, 47 Stat. 5, by authorizing it, among other things, to create regional agricultural credit corporations "in any of the twelve Federal land-bank districts." Emergency Relief and Construction Act of 1932, § 201(e), c. 520, 47 Stat. 709, 713. Each corporation was to have a paid-up capital of not less than $3,000,000 to be subscribed for by Reconstruction, was to be managed by appointees of Reconstruction, and was empowered to make loans to farmers and stockmen for agricultural purposes or for raising and marketing livestock. Accordingly, on September 10, 1932, Reconstruction chartered the Regional Agricultural Credit Corporation of Sioux City, Iowa (hereafter called "Regional"). Regional, in due exercise of its powers, entered into so-called cattle-feeding contracts, whereby it undertook to provide sufficient feed and water for livestock with appropriate security for rendering these services. Failure through negligence to provide proper care for cattle delivered

under this arrangement, with resulting damage to the livestock, is the basis of this suit brought by petitioner, plaintiff below, against Reconstruction and Regional. Both defendants demurred on several grounds, of which challenge to the jurisdiction of the court is alone pertinent here. The District Court sustained the demurrers and dismissed the suit. 22 F. Supp. 918. The Court of Appeals affirmed, holding for Reconstruction because its control of Regional had been transferred by Executive Order (No. 6084, dated March 27, 1933, effective May 27, 1933) to the Farm Credit Administration prior to the alleged cause of action, and for Regional because it was found immune from suit. 97 F. (2d) 812. Certiorari was granted, directed solely to the latter issue. 305 U. S. —.

The starting point of inquiry is the immunity from unconsented suit of the government itself. As to the states, legal irresponsibility was written into the Eleventh Amendment; as to the United States it is derived by implication. *Monaco* v. *Mississippi*, 292 U. S. 313, 321. For present purposes it is academic to consider whether this exceptional freedom from legal responsibility rests on the theory that the United States is deemed the institutional descendant of the Crown, enjoying its immunity but not its historic prerogatives, cf. *Langford* v. *United States*, 101 U. S. 341, 343, or on a metaphysical doctrine "that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353. But because the doctrine gives the government a privileged position, it has been appropriately confined.[1]

Therefore, the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. *United States* v. *Lee*, 106 U. S. 196, 211, 221; *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549, 567. For more than a hundred years corporations have been used as agencies for doing work of the government. Congress may create them "as appropriate means of executing the powers of government, as, for instance, . . . a railroad corporation for the purpose of promoting commerce among the states." *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 529. But this would not confer

[1] See Professor Borchard's bibliography in (1934) 20 A. B. A. J. 747, 748, and the collection of authorities in Judge Mack's opinion in The Pesaro, 277 Fed. 473, *rev'd*, 271 U. S. 562.

on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted. In the context of modern thought and practice regarding the use of corporate facilities, such a clause is not a ritualistic formula which alone can engender liability like unto indispensable words of early common law, such as "*warrantizo*" or "to A and his heirs", for which there were no substitutes and without which desired legal consequences could not be wrought. Littleton, Tenures (Wambaugh ed.) §§ 1, 733.

Congress may, of course, endow a governmental corporation with the government's immunity. But always the question is: has it done so? *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 231. Cf. *Helvering* v. *Gerhardt*, 304 U. S. 405, 411-412n. This is our present problem. Has Congress endowed Regional with immunity in the circumstances which enveloped its creation? It is not a textual problem; for Congress has not expressed its will in words. Congress may not even have had any consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute from which flow the rights and responsibilities of Regional, but in a series of statutes utilizing corporations for governmental purposes and drawing significance from dominant contemporaneous opinion regarding the immunity of governmental agencies from suit.

Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of government in economic affairs have greatly extended the use of independent corporate facilities for governmental ends.[2] In spawning these corporations during the past two decades, Congress has uniformly included amenability to law. Congress has provided for not less than forty of such corporations discharging governmental functions, and without exception the authority to-sue-and-be-sued was included.[3] Such a firm practice is partly an indication of the present climate of

[2] See Thurston, Government Proprietary Corporations; Van Dorn, Government Owned Corporations; McDiarmid, Government Corporations and Federal Funds; Field, *Government Corporations: A Proposal* (1935) 48 HARV. L. REV. 775; McIntyre *Government Corporations as Administrative Agencies: An Approach* (1936) 4 GEO. WASH. L. REV. 161.

[3] The American Legion, 41 Stat. 284, 285; Foreign Banking Corporations, 41 Stat. 378, 379; China Trade Act Corporation, 42 Stat. 849, 851; Belleau Wood Memorial Association, 42 Stat. 1441; Federal Intermediate Credit Banks, 42 Stat. 1454, 1455; National Agricultural Credit Corporations, 42 Stat. 1454, 1462; The Grand Army of the Republic, 43 Stat. 358, 359; Inland Waterways Corporation, 43 Stat. 360, 362; The United States Blind

opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope.[4] It is noteworthy that the oldest surviving government corporation—the Smithsonian Institution—has several times been in the law courts, even in the absence of explicit authority and although the general feeling regarding governmental immunity was very different in 1846 from what it has become in our own day. 9 Stat. 102. *Smithsonian Institute* v. *Meech*, 169 U. S. 398; *Smithsonian Institute* v. *St. John*, 214 U. S. 19.

Only two instances have been brought to the Court's attention in which Congress has not explicitly rendered its recent corporate creations amenable to suit. These are the Regionals and the Fed-

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Veterans of the World War, 43 Stat. 535, 536; American War Mothers, 43 Stat. 966, 967; Textile Foundation, 46 Stat. 539, 540; Reconstruction Finance Corporation, 47 Stat. 5, 6; Disabled American Veterans of the World War, 47 Stat. 320, 321; Federal Home Loan Bank, 47 Stat. 725, 735; Tennessee Valley Authority, 48 Stat. 58, 60; Corporation of Foreign Security Holders, 48 Stat. 92, 93; Home Owners' Loan Corporation, 48 Stat. 128, 129; Federal Deposit Insurance Corporation, 48 Stat. 162, 172; Production Credit Corporations, Production Credit Associations, Central Bank for Cooperatives, Regional Banks for Cooperatives, 48 Stat. 257, 266; Federal Farm Mortgage Corporations, 48 Stat. 344, 345; Cairo Bridge Commission, 48 Stat. 575, 581; Port Arthur Bridge Commission, 48 Stat. 1008, 1009; Federal Credit Union, 48 Stat. 1216, 1218; Federal Savings & Loan Insurance Corporation, 48 Stat. 1246, 1256; National Mortgage Associations, 48 Stat. 1246, 1253; American National Theater and Academy, 49 Stat. 457, 458; Federal Housing Administrator, 49 Stat. 684, 722; Veterans of Foreign Wars of the United States, 49 Stat. 1390, 1391; Disaster Loan Corporation, 50 Stat. 19; Farmers' Home Corporation, 50 Stat. 527; Marine Corps League, 50 Stat. 558, 559; Owensboro Bridge Commission, 50 Stat. 640, 645; Southeastern University, 50 Stat. 697, 698; American Chemical Society, 50 Stat. 798, 799, 800 (semble); United States Housing Authority, 50 Stat. 888, 889, 890; Federal Crop Insurance Corporation, 52 Stat. 72, 73; Niagara Falls Bridge Commission, 52 Stat. 767, 770.

This list does not include, of course, the government corporations chartered under general state or District of Columbia incorporation laws. Sloan Shipyards v. U. S. Fleet Corp., *supra*.

[4] Mr. Justice Holmes, on Circuit, gave pioneer expression to inferences to be drawn from legislative policy. "A statute," he wrote in Johnson v. United States, 163 Fed. 30, 32 (C. C. A. 1st), "may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." See also, Taft, C. J., in United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 385-389; Sutherland, J., in Funk v. United States, 290 U. S. 371, 381; Cardozo, J., in Van Beeck v. Sabine Towing Co., 300 U. S. 342, 350-351; Lord Birkenhead, L. C., in Bourne v. Keane [1919] A. C. 815, 830; Landis, *Statutes and the Sources of Law*, Harvard Legal Essays, p. 213.

> Stone, The Common Law in the United States (1936) 50 Hav. L. Rev. 4, 13.

eral Savings and Loan Associations. 48 Stat. 128, 132-134. It is significant that neither of these classes of corporations was the direct emanation of Congress or the offspring of a general incorporation law under Congressional authority. *Sloan Shipyards* v. *U. S. Fleet Corp., supra.* Each was to come into being through an organ that had theretofore been created by Congress. We put the Federal Savings and Loan Associations to one side, because they are not now before the Court.[5] But the circumstances attending the origination of Regional make it manifest that it was within the considerations that have uniformly led Congress to make its immediate corporate creatures subject to suit. The genesis, functions, and affiliations of Regional all negative the assumption that in its operations it was to be without the law.

Reconstruction is the parent of Regional. When creating it, Congress gave Reconstruction various general corporate powers including authority "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, state or federal." 47 Stat. 5, 6. When later Congress authorized Reconstruction to create these Regional Agricultural Credit Corporations, it did so by outlining in a single section of a comprehensive statute the broad scope of this added power for Reconstruction. 47 Stat. 709, 713.[6] Congress naturally assumed that the general corporate powers to which it had given particularity in the original statute establishing Reconstruction would flow automatically to the Regionals from the source of their being. Such, certainly, has been the practical construction of the Regional Agricultural Credit Corporations in the instinctive pursuit of their enterprise. See, e. g., *Hallenbeck* v. *Regional Agricultural Credit Corporation,* 47 Ariz. 477; *Regional Agricultural Credit Corporation* v. *Elston, Prince & McDade,* 183 So. 91 (La.). Cf. *Lewis* v. *Regional Agricultural Credit Corporation,* 92 F. (2d) 1008 (C. C. A. 10th). To imply for Regionals a unique legal position compared with those corporations to whose purposes Regional is so closely allied,[7] is to infer Congressional idiosyncrasy. There is a

[5] It is to be noted that the progenitor of these Associations—the Federal Home Loan Bank Board—is not itself a corporation. But see Sloan Shipyards v. U. S. Fleet Corp., *supra,* in which the Fleet Corporation was found subject to suit although Congress authorized its creation through the President.

[6] Section 201(e) of the statute, providing for Regional Agricultural Credit Corporations, covers less than half a page of a fifteen-page statute.

[7] See, e. g., Federal Land Banks, 39 Stat. 360, 363; Joint Stock Land Banks, 39 Stat. 360, 374; Federal Intermediate Credit Banks, 42 Stat. 1454, 1455; National Agricultural Credit Corporations, 42 Stat. 1454, 1462; Production Credit Corporations, Production Credit Associations, Central Bank

much more sensible explanation for the failure of Congress to bring Regional by express terms within its emphatic practice not to confer sovereign immunity upon these government corporations. Congress had a right to assume that the characteristic energies for corporate enterprise with which a few months previously it had endowed Reconstruction would now radiate through Reconstruction to Regional.

To give Regional an immunity denied to more than two score corporations, each designed for a purpose of government not relevantly different from that which occasioned the creation of Regional, is to impute to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none. A fair judgment of the statute in its entire setting relieves us from making such an imputation of caprice.

The legal position of Regional is, therefore, the same as though Congress had expressly empowered it "to sue and be sued." The scope of this liability remains to be explored.

Regional claims immunity in any event because Congress has not subjected it to suit "in tort". It is assumed that the present action is not one upon a contract, express or implied, and, therefore, outside the purview of "to sue and be sued." The premise is not valid, nor does the conclusion follow.

The transaction which gave rise to the controversy was a bailment of livestock for hire, and the cause of action lack of reasonable diligence by the bailee. Ever since the fifteenth century, according to Maitland, there were "actions against bailees for negligence in the custody of goods intrusted to them, and here also it was necessary to allege an assumpsit"—the having undertaken to do something. Maitland, Equity, Lecture VI, pp. 362, 363; Maitland, The Forms of Action at Common Law, Lecture VI, pp. 68, 69. That Regional's failure properly to feed and water the livestock entrusted to it by the cattle-feeding contract was not a wrong dissociated from carrying out the very transaction which brought it into existence, is evident from the recognized liability of the United States itself as lessee and bailee even under the

for Cooperatives, Regional Banks for Cooperatives, 48 Stat. 257, 266; Federal Farm Mortgage Corporations, 48 Stat. 344, 345; National Mortgage Associations, 48 Stat. 1246, 1253. Congress itself recognized the identity of purpose in these various corporations. 48 Stat. 267, 268. Note, too, hat Production Credit Corporations, successors to Regional Agricultural Credit Corporations, are subject to suit. 48 Stat. 257, 266.

explicit restrictions of the Court of Claims Acts.[8] Both this Court and the Court of Claims have sustained actions not dissimilar from the present. They have recognized that the breach of implied duty of a lessee "not to commit waste, or suffer it to be committed," *United States* v. *Bostwick*, 94 U. S. 53, 68, and of a bailee not to neglect "to exercise ordinary care and skill," *Gulf Transit Co.* v. *United States*, 43 Ct. Cl. 183, 199, are duties that have their source in contract even though the guilty agents may be merely tort-feasors. To be sure, the common law fiction of waiving the tort and suing in assumpsit cannot be used as an evasion of the limited liability created by the Court of Claims Acts. *Bigby* v. *United States*, 188 U. S. 400; *United States* v. *Minn. Investment Co.*, 271 U. S. 212, 217. But where the wrong really derives from an undertaking, to stand on the undertaking and to disregard the tort is not to invoke a fictive agreement. It merely recognizes a choice of procedural vindications open to the injured party.

To assume that Congress in subjecting these recently created governmental corporations to suit meant to enmesh them in these procedural entanglements, would do violence to Congressional purpose. When it chose to do so, Congress knew well enough how to restrict its consent to suits sounding only in contract, even with all the controversies in recondite procedural learning that this might entail. It did so with increasing particularity in the successive Court of Claims Acts. 10 Stat. 612; 24 Stat. 505; 28 U. S. C. §§ 41(20), 250(1). In the light of these statutes it ought not to be assumed that when Congress consented "to suit" without qualification, the effect is the same as though it had written "in suits on contract, express or implied, in cases not sounding in tort." No such distinction was made by Congress, and no such interpolation into statutes has been made in cases affecting government corporations incorporated under state law or that of the District of Columbia.[9] There is equally no warrant for importing such a distinction here. To do so would make application of a steadily growing policy of governmental liability contingent upon irrelevant pro-

[8] The Act of February 24, 1855 (10 Stat. 612), establishing the Court of Claims allowed suit for claims "upon any contract, express or implied . . ." The Act of March 3, 1887 (24 Stat. 505) allowed suits for claims "upon any contract, express or implied . . . or for damages, liquidated or unliquidated, in cases not sounding in tort. . . ." See 28 U. S. C. §§ 41(20), 250(1).

[9] The cases are collected in Thurston, *Government Proprietary Corporations* (1935) 21 VA. L. REV. 351, 378, *et seq.*

cedural factors. These, in our law, are still deeply rooted in historical accidents to which the expanding conceptions of public morality regarding governmental responsibility should not be subordinated.

Congress has embarked upon a generous policy of consent for suits against the government sounding in tort even where there is no element of contract. It has sanctioned suits for patent infringement, 36 Stat. 851, provided for compensation for the disability or death of a government employee "while in the performance of his duty," 39 Stat. 742, authorized payment for damage to property by the Army Air Service. 41 Stat. 169. These and other public statutes and many private bills were founded on considerations thus generalized in a Report of the Senate Committee on Claims:

"In other words, it may be said that Congress has recognized the general liability of the Government within maximum amounts for the negligence of officers and employees of the United States, but the machinery for determining that liability is defective and results in overburdening the Claims Committee of Congress and Congress itself with the consideration of tort liability claims and with injuries to the claimants.

This proposed legislation is designed to relieve the situation by utilizing the machinery of the Accounting Office and judicial branches of the Government in the assistance of Congress." Senate Report No. 1699, 70th Cong., 2d Sess., p. 4. See also Senate Report No. 658, 72d Cong., 1st Sess., p. 3.

Acting on these views, Congress passed a general court of claims bill, which, however, at the close of the session failed of enactment by President Coolidge's pocket-veto. H. R. 9285, 70th Cong., 1st Sess.; 70 Cong. Rec. 4836.[10] Congress has thus clearly manifested an attitude which serves as a guide to the scope of liability implicit in the general authority it has conferred on governmental corporations to sue and be sued. We should be denying the recent trend of Congressional policy to relieve Regional from liability. This compels us to reverse the judgment of the court below.

Reversed.

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[10] That objections to the administrative features of the bill were the probable reasons for the veto is indicated by a memorandum of Attorney-General Sargent, for which see McGuire, *Tort Claims against the United States* (1931) 19 Geo. L. J. 133, 134, 135.